CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 93-65)

REMISSION OR REFUND OF VESSEL REPAIR DUTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to eliminate the filing of supplemental petitions for review when seeking the remission or refund of vessel repair duties. The amended regulations provide that a party seeking remission or refund after liquidation of a vessel repair entry must file a valid protest. These amendments conform the regulations to existing case law, and will simplify the administration of the vessel repair statute by ending the confusion which has arisen as to the proper agency review procedure which a party must follow thereunder.

EFFECTIVE DATE: August 19, 1993.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton, Carrier Rulings Branch, (202-482-6940).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As provided in 19 U.S.C. 1466(a), and § 4.14(a), Customs Regulations (19 CFR 4.14(a)), equipment purchases for, and repairs made to, an American vessel, while outside the United States, are dutiable at the rate of 50 percent ad valorem on their actual cost in the foreign country where they are incurred. An entry covering the applicable duties must be filed with Customs for such equipment or repairs following the arrival of the vessel in the United States. This entry would be forwarded to the appropriate Customs vessel repair liquidation unit. 19 CFR 4.14(b)(2).

Duties which may be properly assessed on equipment purchases or repairs under § 1466(a) are nevertheless subject to refund or remission if the purchases or repairs are made under the conditions set forth in § 1466(d) (19 U.S.C. 1466(d)), and § 4.14(c)(3)(i-iii), Customs Regulations (19 CFR 4.14(c)(3)(i-iii)).

Section 4.14(d), Customs Regulations (19 CFR 4.14(d)), prescribes the administrative avenue through which a party may seek remission or refund of vessel repair duties. Under this regulation, a party may file an

application for relief within 60 days of arrival of the vessel, either challenging the classification of an item or a repair expense as dutiable under § 1466(a), or seeking the remission or refund of these duties under § 1466(d). If the application for relief is denied, the party may file a petition for review under § 4.14(d)(2)(i). Liquidation of the entry is suspended during both of these proceedings. If the petition for review is denied, a supplemental petition may be filed, but liquidation of the entry is no longer suspended. 19 CFR 4.14(d)(2)(iii).

Following liquidation of the entry, § 4.14(f) requires that a protest under 19 U.S.C. 1514 be filed against the decision to treat an item or a repair expense as dutiable under § 1466(a). There is, however, no equivalent directive concerning an appeal from a Customs decision to deny remission or refund of duties under § 1466(d). It was in fact Customs position that the remission or refund of vessel repair duties under § 1466(d) was not encompassed within § 1514 protest procedures and thus had to be pursued through the supplemental petition procedure.

The legal permissibility of this divergent post-liquidation appeal process, however, was overruled by the Court of International Trade in the case of *Penrod Drilling Co. v. United States,* 13 CIT 1005, 1010–1012 (1989). Essentially, the court held in *Penrod* that the decision by Customs to deny remission or refund under § 1466(d) constituted an official decision affecting the amount of duties chargeable, which, therefore, could only be appealed by filing a valid protest under § 1514. Consequently, the failure of the party there to timely protest Customs decision left the court with no jurisdiction to review the merits of the case.

Since the *Penrod* ruling, Customs has treated all supplemental petitions for remission or refund of duties under § 1466(d) as protests, if they are filed in a timely manner following liquidation of the related entry.

Accordingly, in light of the foregoing, Customs is amending § 4.14(d), (e) and (f), as necessary, in order to eliminate the discredited supplemental petition procedure for vessel repairs, and to provide that Customs decisions denying remission or refund under § 1466(d) are also subject to protest under § 1514.

As already made clear, these amendments conform the regulations to existing case law, and, furthermore, they will simplify the administration of the vessel repair statute by ending the confusion which has arisen as to the proper agency review procedure which a party must follow when seeking the remission or refund of duties thereunder.

Inapplicability of Public Notice and Comment and Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12291

For the reasons set forth in the preamble, pursuant to 5 U.S.C. 553(b), good cause exists for dispensing with notice and public procedure, and, pursuant to 5 U.S.C. 553(d), a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the Regulatory Flexibility

Act (5 U.S.C. 601 *et seq.*). These amendments do not meet the criteria for a "major rule" as defined in E.O. 12291; therefore, a regulatory impact analysis is not required thereunder.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Oil Pollution, Reporting and recordkeeping requirements, Vessels.

AMENDMENTS TO THE REGULATIONS

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific sectional authority for § 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

§ 4.14 also issued under 19 U.S.C. 1466, 1498;

* * * * * * *

2. Section 4.14 is amended by removing the last two sentences of paragraph (d)(1)(v) and adding a new sentence in place thereof, by revising the last sentence, respectively, of paragraphs (d)(2)(iii), (d)(2)(iv), and (e), and by revising paragraph (f) to read as follows:

§ 4.14 Foreign equipment purchases by, and repairs to, American vessels.

* * * * * * *

(d) * * *

(1) * * *

(v) * * * If the entry has been liquidated, reliquidation is required.

* * * * * * *

(2) * * *

(iii) * * * The notice will inform the party that no further suspension of liquidation will be permitted.

(iv) * * * Following notification of the Headquarters decision to the party who filed the petition, the vessel repair liquidation unit shall promptly initiate liquidation of the entry in accordance with that decision.

(e) * * * If a petition for review is filed timely, the vessel repair entry may be liquidated after the date of the notification of the decision on the petition to the party who filed the petition.

(f) *Protests.* Following liquidation of an entry, a protest under part 174 of this chapter may be filed against the decision to treat an item or a repair as dutiable under paragraph (a) of this section, or against the decision denying the remission or refund of vessel repair duties under paragraph (c) of this section.

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: August 2, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 19, 1993 (58 FR 44127)]

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19 CFR Parts 4, 10, 12, 122, 128, 141, 148, 152, and 162

(T.D. 93-66)

TECHNICAL CORRECTIONS TO THE CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by making certain technical corrections necessary to ensure that the regulations are as accurate and up-to-date as possible. While most of the corrections address typographical and printing errors, some involve changes to regulatory language to more accurately reflect the underlying statutory language; none of the corrections involve changes in substantive legal requirements.

EFFECTIVE DATE: August 19, 1993.

FOR FURTHER INFORMATION CONTACT: Gregory R. Vilders, Regulations Branch (202) 482-6930.

SUPPLEMENTARY INFORMATION:

BACKGROUND

It is Customs policy to periodically review its regulations to ensure that they are as accurate and up-to-date as possible, so that the importing and general public are aware of Customs programs, requirements, and procedures regarding import-related activities. As part of this review policy, Customs has determined that certain changes affecting sections 4, 10, 12, 122, 128, 141, 148, 152, and 162 of the Customs Regulations (19 CFR Parts 4, 10, 12, 122, 128, 141, 148, 152, and 162) are necessary to correct typographical and citation-referencing errors, *e.g.*, the statutory citation to the United States-Canada Free-Trade Agreement

Implementation Act is 102 Stat. 1851, not as is currently cited, 100 Stat. 418, and to make certain conforming changes to the regulations, *e.g.*, changing the country name of Dahomy to Benin for purposes of certain reciprocal trade privileges. Following is a summary of these changes:

Discussion of Changes

Part 4:

1. In § 4.7a(c), the last sentence refers to "the Tariff Schedules of the United States (19 U.S.C. 1202)"—commonly referenced as the TSUS, which were replaced on January 1, 1989, by the "Harmonized Tariff Schedule of the United States"—commonly referenced as the HTSUS. Although 19 U.S.C. 3012 provides that any reference in any law to the "Tariff Schedules of the United States", "the Tariff Schedules", "such Schedules", and any other general reference that clearly refers to the old Schedules shall be treated as a reference to the Harmonized Tariff Schedule, the present tariff schedule reference is clarified by adding a reference to the HTSUS.

2. In § 4.14(b)(1) the last sentence references § 113.14(m) in the context of bond values; however, this provision does not address bond values: § 113.13 does. Accordingly, the reference is revised to read § 113.13.

3. In § 4.30(e) footnote 62a references footnote 59, which has been deleted. Accordingly, footnote 62a is deleted.

4. In § 4.39(b) footnote 75 references footnote 58, which has been deleted. Accordingly, footnote 75 is deleted.

Part 10:

5. In § 10.3(c)(3), a reference to the Harmonized Tariff Schedule of the United States (HTSUS) tariff provision—9801.00.70—does not employ the appropriate HTSUS terminology. The word "subheading" should precede the tariff provision reference. (Under the former Tariff Schedules of the United States (TSUS), tariff provision references were preceded by the word "item"). When the United States changed tariff schedules, from the TSUS to the HTSUS, see, T.D. 89–1, the correct terminology was inadvertently omitted in this provision. This oversight is corrected by adding the word "subheading" preceding the tariff provision reference.

6. In § 10.41, paragraph (d) makes reference to certain parenthetical matter in paragraph (b); however, paragraph (b) is a reserved section. The parenthetical matter once found at paragraph (b) is now found at § 123.14(c). Accordingly, the reference in paragraph (d) is revised to reference § 123.14(c).

7. In § 10.53(d), reference is made to "subheading 9706.00.00 HTSUS" and "items 766.20 and the Tariff Schedules of the United States"; the latter reference should read the same as the former reference. Accordingly, the latter reference is revised to read "subheading 9706.00.00, HTSUS".

8. In § 10.59(f), Dahomy is denominated as a country entitled to certain reciprocal trade privileges; however, since 1976, that country has

been recognized by the United States as Benin, entitled to the same reciprocal trade privileges. Accordingly, this section is amended to replace the country name of Dahomy with the country name of Benin.

9. In § 10.71, paragraph (e) references subheading 0101.11.00, HTSUS, whereas, it should reference subheading 0106.00.50, HTSUS, and paragraph (f) references item 100.01, TSUS, which provided for the entry of purebred cats and dogs, but this tariff provision was not carried over into the HTSUS. Accordingly, paragraph (e) is revised and paragraph (f) is deleted.

10. In § 10.84, the Automotive Products Trade Act of 1965 is incorrectly referenced in the fourth sentence of paragraph (a)(1). This printing error is corrected.

11. In two sections of Part 10, the statutory reference to the United States-Canada Free-Trade Agreement Implementation Act of 1988 is incorrectly cited as 100 Stat. 418; it should read 102 Stat. 1851. Accordingly, the statutory reference is corrected.

Part 12:

12. In T.D. 82–145, § 12.40(f) was amended by adding the word "unlawful" before the word "abortion" to reflect the provisions of 19 U.S.C. 1305; however, a parallel provision at § 12.40(h) was not similarly changed. This oversight is corrected by adding the word "unlawful" before the word "abortion" in § 12.40(h).

Part 122:

13. In § 122.1(h)(1), the colon following the text should be a semicolon to introduce the second element. Accordingly, the punctuation is changed.

Part 128:

14. In § 128.11, paragraph (b)(4) provides that an application for approval of an express consignment carrier or hub facility must include a processing fee, "as set forth in paragraph (e) of this section"; however, there is no paragraph (e). Accordingly, § 128.11(b)(4) is amended to correct this error.

Part 141:

15.Certain sections of Subpart F to Part 141—and some sections of Part 142—reference the Special Summary Steel Invoice requirement of § 141.89(b), which was recently eliminated in T.D. 93–21. Specifically, §§ 141.81, 141.82(e), 141.83(b), 141.91, and 141.92(a) in Part 141 all reference this special summary invoice. To correct these now moot references, the references to this special summary invoice in §§ 141.81, 141.91, and 141.92(a) are removed from the Regulations, and § 141.82(e) is deleted. However, because three sections in Part 142—§§ 142.3(a)(3), 142.6(a), and 142.16(a)—cross-reference certain paragraphs in § 141.83, only the text of § 141.83(b) is removed; the paragraph is reserved, so that the other paragraphs in § 141.83, specifically the referenced § 141.83(d), do not have to be redenominated.

16. In § 141.113, paragraph (a)(5), the reference to the tariff code identifies the wrong subchapter of the Harmonized Tariff Schedule of the United States (HTSUS), and, in paragraph (g), the reference is to Schedule 8 of the Tariff Schedules of the United States (TSUS), rather than to subchapter XIII, Chapter 98, of the Harmonized Tariff Schedule of the United States (HTSUS). Accordingly, these references are corrected.

Part 148:

17. In § 148.105(b)(3), reference is made to "item numbers of the tariff schedules" (a reference to the TSUS) and not to "subheading numbers under the Harmonized Tariff Schedule of the United States (HTSUS)". Accordingly, this tariff reference is revised to reference the HTSUS.

18. In § 148.113(a), a reference is made to the "subheading 9816.00.40 HTSUS of the tariff schedules". This reference is made clearer by removing the words "of the tariff schedules".

19. In § 148.115(a)(2), a reference is made to "item[s]" of the tariff schedules. For the reason discussed at number 5 above, the word "subheading" is added in lieu of "item" and the word "schedules" is made singular to reference the HTSUS.

Part 152:

20. In § 152.2 , the reference to "Customs Form 28" should read "Customs Form 29" and is revised accordingly.

Part 162:

21. In § 162.1d(b), the reference "(area director in region II)" is revised to read "(area director, New York Region)".

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12291

Inasmuch as these amendments merely correct certain typographical and printing errors in the regulations and otherwise conform the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. 553(a)(2) and (b)(B), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(a)(2) and (d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.).* This amendment does not meet the criteria for a "major rule" as defined in E.O. 12291; therefore, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations Branch.

LIST OF SUBJECTS

19 CFR Part 4

Bonds, Customs duties and inspection, Imports, Maritime carriers, Merchandise, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 10

Animals, Customs duties and inspection, Foreign relations, Imports, Motor vehicles, Trade agreements, U.S.-Canada Free-Trade Agreement.

19 CFR Part 12

Customs duties and inspection, Prohibited merchandise, Restricted merchandise, Reporting and recordkeeping requirements.

19 CFR Part 122

Administrative practice and procedure, Aircraft, Airports, Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 128

Administrative practice and procedure, Customs duties and inspection, Freight, Reporting and recordkeeping requirements.

19 CFR Part 141

Customs duties and inspection, Invoices, Reporting and recordkeeping.

19 CFR Part 148

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR 152

Administrative practice and procedure, Customs duties and inspection.

19 CFR 162

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Parts 4, 10, 12, 122, 128, 141, 148, 152, and 162 of the Customs Regulations (19 CFR Parts 4, 10, 12, 122, 128, 141, 148, 152, and 162) are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1.The general authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C.App. 3;

* * * * * * *

2. In section 4.7a, paragraph (c)(1) is amended by removing the words "Tariff Schedules of the United States" in the last sentence and adding, in their place, the words "Harmonized Tariff Schedule of the United States (HTSUS)".

3. In section 4.14, paragraph (b)(1) is amended by removing the reference "§ 113.14(m)" and adding, in its place, the reference "§ 113.13".

4. In section 4.30, paragraph (e) is amended by removing the "62a" footnote.

5. In section 4.39, paragraph (b) is amended by removing and reserving "75" footnote.

PART 10–ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * * * *

2. In section 10.3, paragraph (c)(3) is amended by adding the word "subheadings" before both references to "9801.00.70 or 9801.00.80".

3. In section 10.41, paragraph (d) is amended by revising the clause "except as stated in the parenthetical matter in paragraph (b) of this section," to read "except as provided at § 123.14(c)".

4. In section 10.53, paragraph (d) is amended by removing the words "items 766.20 and Tariff Schedule of the United States" and adding, in their place, the words "subheading 9706.00.00, HTSUS".

5. In section 10.59, paragraph (c) is amended by adding the words ", Harmonized Tariff Schedule of the United States (HTSUS)" at the end of the sentence; paragraph (f) is amended by removing "Dahomy", from the column headed "Country", and "71–215", which is adjacent to "Dahomy" in the column headed "Treasury Decision(s)", and adding, in appropriate alphabetical order, the country "Benin" and listing "71–215, 93– ", adjacent to "Benin" in the column headed "Treasury Decision(s)".

6. In section 10.71, paragraph (e) is amended by revising the reference "0101.11.00" to read "0106.00.50", and paragraph (f) is removed.

7. In section 10.84, the third sentence of paragraph (a)(1) is amended by adding at the end ", HTSUS"; the fourth sentence is amended by adding the word "Trade" after the words "Automotive Products" and adding the reference ", HTSUS" at the end of the sentence.

8. In section 10.84, paragraph (a)(2) is amended by removing the reference "100 Stat. 418" within the parentheses and by adding, in its place, the reference "102 Stat. 1851".

9. In section 10.301, the first sentence is amended by removing the reference "(100 Stat. 418)" and by adding, in its place, the reference "(102 Stat. 1851)".

PART 12–SPECIAL CLASSES OF MERCHANDISE

1.The authority citation for part 12 is revised, in part, to read as follows:

Authority: 5 U.S.C 301; 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.40 and 12.41 also issued under 19 U.S.C. 1305;

* * * * * * *

2. In section 12.40, paragraph (h) is amended by adding the word "unlawful" before the word "abortion".

PART 122—AIR COMMERCE REGULATIONS

1.The authority citation for part 122 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644; 49 U.S.C.App. 1509.

2. In section 122.1, paragraph (h)(1) is amended by removing the colon and adding, in its place, a semicolon.

PART 128—EXPRESS CONSIGNMENTS

1.The authority citation for part 128 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1484, 1498, 1551, 1555, 1556, 1565, 1624.

2. In section 128.11, paragraph (b)(4) is amended by removing the words "paragraph (e) of this section" and adding, in their place, the reference "§ 128.13".

PART 141—ENTRY OF MERCHANDISE

1.The general authority citation for part 141 is revised to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624;

* * * * * * *

2. Section 141.81 is amended by removing the words "special summary invoice, or a".

3. Section 141.82 is amended by removing paragraph (e).

4. Section 141.83 is amended by removing and reserving paragraph (b).

5. In section 141.91, the introductory paragraph is amended by removing the clause ", other than a special summary invoice,".

6. In section 141.92, paragraph (a) is amended by removing the clause ", except a special summary invoice required by § 141.83(b),".

7. In section 141.113, paragraph (a)(5) is amended by removing the words "United States Tariff Schedule (19 U.S.C. 1202)" and adding, in their place, the words "Harmonized Tariff Schedule of the United States (HTSUS)"; the first sentence in paragraph (g) is amended by revising the reference to "Subchapter XII" to read "Subchapter XIII", and the second sentence is amended by removing the words Subchapter XII and by adding, in their place, the words "Subchapter XIII".

PART 148 – PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority citation for part 148 is revised, in part, to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624;

The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS));

* * * * * * *

2. In section 148.105, paragraph (b)(3) is amended by removing the words "item numbers of the tariff schedules" and adding, in their place, the words "subheadings of the HTSUS".

3. In section 148.113, paragraph (a) is amended by removing the words "of the tariff schedules."

4. In section 148.115, paragraph (a)(2) introductory text is amended by removing the word "item" and adding, in its place, the word "subheading" and revising the word "schedules" to read "schedule".

PART 152 – CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

1. The general authority citation for part 152 continues to read as follows:

Authority: 19 U.S.C. 66, 1401a, 1500, 1502, 1624;

* * * * * * *

2. Section 152.2 is amended by revising the words "Customs Form 28" to read "Customs Form 29".

PART 162 – RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624;

* * * * * * *

2. In section 162.1d, paragraph (b) introductory text is amended by removing the words "in region II" in parentheses and adding, in their place, the words, " New York Region".

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: August 12, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 19, 1993 (58 FR 44128)]

19 CFR Part 122

(T.D. 93–67)

ADDITION OF DOUGLAS MUNICIPAL AIRPORT TO LIST OF DESIGNATED LANDING LOCATIONS FOR PRIVATE AIRCRAFT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Douglas Municipal Airport, Douglas, Arizona, to the list of designated airports at which private aircraft, arriving in the Continental U.S. via the U.S./Mexican border, the Pacific Coast, the Gulf of Mexico, or the Atlantic Coast, from certain locations in the southern portion of the Western Hemisphere, must land for Customs processing. This amendment is made to improve the effectiveness of Customs enforcement efforts to combat the smuggling of drugs by air into the United States, as Douglas is adjacent to the Southwest Border of the U.S. and is on a regularly traveled flight path, and to improve service to the community, by relieving congestion at the Bisbee-Douglas International Airport, also located in Douglas, Arizona.

EFFECTIVE DATE: September 22, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. Joe O'Gorman, Office of Inspection and Control, (202) 927–0543.

SUPPLEMENTARY INFORMATION:

Background

On April 14, 1993, Customs published a notice of proposed rulemaking in the Federal Register (58 FR 19366) that solicited comments concerning a proposal to amend § 122.24(b), Customs Regulations (19 CFR 122.24(b)), by adding Douglas Municipal Airport, Douglas, Arizona, to the list of designated airports at which private aircraft, arriving in the continental U.S. via the U.S./Mexican border, the Pacific Coast, the Gulf of Mexico, or the Atlantic Coast, from certain locations in the southern portion of the Western Hemisphere, must land for Customs processing. Based on requests from community officials from Douglas, Arizona, Customs had determined that the addition of Douglas Municipal Airport to the list of designated landing sites for subject aircraft would improve the effectiveness of Customs drug-enforcement programs relative to private aircraft arrivals, as Douglas is adjacent to the Southwest Border of the U.S. and on a regularly traveled flight path, and would enhance the efficiency of the Customs Service, as the airport is close to the normal work location for inspection personnel assigned in the Port of Douglas area.

Although notice of the proposed designation was not required to be published in the Federal Register, comments were solicited from inter-

ested parties concerning whether or not the Douglas Municipal Airport should be designated as an airport for the landing of private aircraft. The public comment period for the proposed amendment closed June 14, 1993, and no comments were received. After further consideration of the matter, Customs has decided to proceed with the final amendment as proposed.

Inapplicability of the Regulatory Flexibility Act and Executive Order 12291

Although a notice of proposed rulemaking was published soliciting public comments on this action expanding the list of designated airports at which certain private aircraft may land for Customs processing, this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because the subject matter constitutes both a matter relating to agency organization and management and a matter relating to public benefits. Since the action is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*. Further, as the amendment does not meet the criteria for a "major rule" as defined in E.O. 12291, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was Gregory R. Vilders, Regulations Branch.

List of Subjects in 19 CFR Part 122

Air transportation, Aircraft, Airports, Customs duties and inspection, Drug traffic control, Reporting and recordkeeping requirements.

Amendment to the Regulations

For the reasons stated above, part 122 of the Customs Regulations (19 CFR part 101), is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644; 49 U.S.C. App. 1509.

2. In § 122.24, the chart in paragraph (b) is amended by adding, in appropriate alphabetical order, "Douglas, Ariz." in the column headed "Location" and, on the same line, "Douglas Municipal Airport" in the column headed "Name".

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: August 9, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury

[Published in the Federal Register, August 23, 1993 (58 FR 44443)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 133

COPYRIGHT/TRADEMARK/TRADE NAME PROTECTION; DISCLOSURE OF INFORMATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to allow Customs to disclose to intellectual property rights owners sample merchandise and certain information regarding the identity of persons involved with importing merchandise that is detained or seized for infringement of registered copyright, trademark, or trade name rights. The disclosure of such information would enable concerned intellectual property rights owners to more expeditiously proceed to enforce their property rights by means of instituting appropriate judicial remedies against the parties identified as involved with infringing particular property rights.

DATES: Comments must be received on or before October 22, 1993.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments submitted may be inspected at Franklin Court, 1099 14th Street, NW. - Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Timothy P. Trainer, Intellectual Property Rights Branch (202) 482-6960.

SUPPLEMENTARY INFORMATION:

Background

Under the present regulatory framework, intellectual property rights (IPR) owners are not immediately provided with sufficient information to pursue private remedial actions in a court of law against persons importing infringing merchandise; they must wait until all administrative actions have been completed or file Freedom of Information Act requests to obtain the information necessary to institute legal proceedings against infringing parties, which can be a very lengthy process and allows infringers to continue their import practices. This is because, his-

torically, it has been Customs policy not to release information of a confidential business nature from entry documents to others than the parties in interest. See, for example, T.D. 32016, 21 Treas. Dec. 552 (1911) (no information of a confidential nature should be furnished to any persons not parties in interest, that is, parties having a direct interest in the transactions, or their attorneys, and access to official records should not be permitted except by a person entitled to such privilege). The Customs Regulations implementing this policy are generally contained in 19 CFR Part 103.

Notwithstanding this general policy of nondisclosure of confidential business information, certain Customs transactions present issues that require disclosure of certain party identification information, normally treated as confidential information, to individuals who have certain rights at risk. One such area of Customs transactions concerns the private enforcement of protected IPRs where imported merchandise is seized because it appears to infringe copyright, trademark, or trade name laws.

Currently, such trademark counterfeit/copyright infringing merchandise information as is provided to IPR owners is dependent on the nature of the IPR involved, *i.e.*, whether the IPR concern trademark or copyright interests, and whether Customs has merely detained or actually seized the merchandise imported. As regards counterfeit trademark merchandise, § 133.23a(c), Customs Regulations (19 C.F.R. 133.23a(c)), provides that the owner of a trademark shall be notified when imported merchandise is seized for violation of the trademark laws and informed of the quantity of the article seized. Whereas in the area of copyrights, § 133.43(b), Customs Regulations (19 C.F.R. 133.43(b)), provides that copyright owners shall be furnished with a sample of imported articles suspected of being an infringing copy or phonorecord of a recorded copyrighted work, together with notice that the imported article will be released to the importer absent some affirmative action on the part of the copyright owner, if the importer denies that the imported merchandise infringes any copyrighted articles.

This disparity in the amount and type of information and when it is disclosed to IPR owners is the result of statutory interpretation differences. The copyright procedure—allowing Customs officers to provide samples to copyright owners in cases on suspicion of copyright infringement—arises from Customs interpretation of 17 U.S.C. 602(b), which provides that Customs will notify copyright owners of the importation of articles which appear to infringe (suspected of infringing). The trademark procedure—requiring notification to trademark owners upon seizure of infringing merchandise—is based on § 526(e), Tariff Act of 1930 (19 U.S.C. 1526(e)), which provides that Customs will notify trademark owners when there has been a seizure. Thus, the statutory language of these two provisions has been interpreted to require different notifications to different IPR owners at different times and in disparate amounts.

Regarding the trademark procedure, while § 526(e) states that "Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, * * *", the statute is otherwise silent regarding what information the trademark owner is to be provided relating to the seized merchandise. Customs believes that § 526(e) may be reasonably interpreted to permit Customs to provide greater information than is presently available to trademark owners. Accordingly, Customs proposes to provide more identifying information to trademark owners concerning counterfeit imported merchandise seized for infringing such property rights; the trademark owner will be provided with the names and addresses of the importer, exporter, and the manufacturer, if available, the quantity of seized merchandise, and a sample. Further, when Customs detains merchandise for bearing a mark which is suspected of infringing, Customs proposes to give trademark owners a sample, the quantity of suspected infringing goods, and the name and address of the manufacturer.

Regarding copyrights, in the Historical Note following § 602 of the Copyright Laws (17 U.S.C. 602), it states that "[t]he subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Customs Service to notify them whenever articles appearing to infringe their works are imported." Since Customs has a procedure to provide samples when an article appears to infringe, we believe that this background supports our proposal to also provide the copyright owner with the name and address of the manufacturer, and the quantity of the suspected goods, at the time of initial notification in cases where articles appear to infringe. In cases where Customs makes a determination of copyright infringement, it will provide the copyright owner with a sample of the infringing item, and the names and addresses of the importer, exporter, and manufacturer.

Comments

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1099 14th Street, NW. – Suite 4000, Washington, D.C.

The Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. The amendments more fully carry out the intent of the law and confer a benefit on intellectual property right owners in the enforcement of such rights. Accordingly, the proposed amendments are not

subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as defined in E.O. 12291; therefore, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS 19 CFR PART 133

Copyright, Counterfeit goods, Customs duties and inspection, Reporting and recordkeeping requirements, Restricted merchandise, Trademarks, Trade names.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend part 133, Customs Regulations (19 CFR part 133), as set forth below:

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for part 133 would continue to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1526, 1624; 31 U.S.C. 9701.

2. It is proposed to amend § 133.22 by revising the section heading and by adding a new first sentence to the introductory language of paragraph (b) to read as follows:

§ 133.22 Procedure on detention of articles subject to restriction.

* * * * * * *

(b) *Notice of detention and disclosure of information.* When merchandise is detained, Customs officers may provide trademark owners with a sample of the item bearing a suspected mark in order to obtain assistance in determining whether the item bears an infringing mark, the quantity involved, and the name and address of the manufacturer, if the information is available. * * *

* * * * * * *

3. It is proposed to amend § 133.23a by revising the first sentence in paragraph (c) to read as follows:

§ 133.23a Articles bearing counterfeit trademarks.

* * * * * * *

(c) *Notice to trademark owner.* Upon seizure of infringing merchandise, the owner of the trademark shall be notified of the names and ad-

dresses of the importer, exporter, and the manufacturer, if the information is available, and the quantity of the articles seized, and a sample of the infringing item.

* * * * * * *

4. It is proposed to amend § 133.42 by redesignating paragraph (d) as paragraph (e) and by adding a new paragraph (d) to read as follows:

§ 133.42 Infringing copies or phonorecords.

* * * * * * *

(d) *Disclosure.* Customs officers may disclose the names and addresses of the exporter, importer, and manufacturer, if available, quantity of articles found to infringe and seized under this section and may provide a sample of the infringing article to the copyright owner.

* * * * * * *

5. It is proposed to amend § 133.43 by revising the introductory text of paragraph (b) to read as follows:

§ 133.43 Procedure on suspicion of infringing copies.

* * * * * * *

(b) *Notice to copyright owner.* If the importer of the suspected infringing copies or phonorecords files a denial as provided in paragraph (a) of this section, the district director shall furnish the copyright owner the name and address of the manufacturer, a sample of the imported article, and the quantity of the suspected infringing articles, together with notice that the imported article will be released to the importer unless, within 30 days from the date of the notice, the copyright owner files with the district director: * * *

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: August 9, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 23, 1993 (58 FR 44476)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93-151)

ROSS COSMETICS DISTRIBUTION CENTERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91-12-00866

[Remanded.]

(Decided August 10, 1993)

Neville, Peterson & Williams (John M. Peterson, Peter J. Allen) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky)*, *Sheryl A. French*, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiff, Ross Cosmetics Distribution Centers, Inc., is a manufacturer, importer and distributor of cosmetics, toiletries and related products. Plaintiff seeks the court's review of the Customs Service Headquarters Ruling 451142 (Ruling) which determined plaintiff's proposed labels and packages of certain cosmetic products constitute counterfeit use of trademarks prohibited under 19 U.S.C. § 1526 (1988). At issue is whether the Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court has jurisdiction pursuant to 28 U.S.C. § 1581(h) (1988).

BACKGROUND

Plaintiff requested Customs' ruling, pursuant to 19 C.F.R. part 177 (1992), on whether its proposed packages for imported bath oils and proposed labels for fragrance oils comply with the laws relating to the use of trademarks. Plaintiff's proposed label on fragrance oil bottles bears the following:

Compare to [famous brand name]
You Will Switch To
PERFUMERS PRIDE
Pure Fragrance Oil #80
0.5 Fl. Oz./15 Ml
OUR FRAGRANCE IS IN NO MANNER
ASSOCIATED WITH OR LICENSED
BY THE MAKERS OF [famous brand name]

By using this language, plaintiff intends to compare its own brand "Perfumers Pride" with better-known, more expensive fragrances. The record is unclear what names plaintiff intends to use as famous brand names.

Plaintiff's proposed packages for bath oils bear the following language at the top of the front panel of the box:

COMPARE TO
[famous brand name]
YOU WILL SWITCH TO
[plaintiff's product name]

The following disclaimer is printed at the bottom of the same side of the box.

OUR PRODUCT IS IN NO MANNER
ASSOCIATED WITH OR LICENSED BY
THE MAKERS OF [famous brand name]

Plaintiff intends to use the following names on the packages of bath oils to promote its products as alternatives to higher priced famous brands:

Famous Brand Names	*Plaintiff's "Alternative Brand" Names*
Youth Dew	Morning Dream
Giorgio	Gorgeous
Opium	Oblivion
Ombre Rose	Whisper
Oscar	Oscent
L'Air du Temps	Love Birds

"Youth Dew," "Giorgio" and "Opium," are registered with the United States Patent and Trademark Office (Trademark Office) as trademarks. These names are also recorded with Customs pursuant to 19 C.F.R. part 133 (1992). The other three brand names are not recorded with Customs, and the record is silent whether they are registered with the Trademark Office.

With respect to the registered and recorded trademarks, Customs ruled that their use on plaintiff's proposed labels and packages would be a counterfeit use of trademarks and, if imported, would be subject to seizure for violation of 19 U.S.C. § 1526(e). For other marks, the Ruling stated that Customs cannot issue a binding ruling on the goods bearing the marks not recorded with Customs. However, it went on to state they may be seized for violation of 18 U.S.C. § 2320 (1988) if those marks are registered with the Trademark Office.

Plaintiff moves pursuant to Rule 56.1 of the Rules of this court for the review upon agency record and seeks the declaratory judgment that the Ruling is not in accordance with law.

Discussion

Customs' determination is set aside when the court finds the agency action to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 28 U.S.C. § 2640(d) (1988); 5 U.S.C.

§ 706(2)(A) (1988). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971) (citations omitted).

I. THE MARKS RECORDED WITH CUSTOMS

Three of the marks plaintiff proposes to use on the packages of its products, "Youth Dew," "Giorgio" and "Opium," are registered with the Trademark Office and recorded with Customs. With respect to these marks, Customs ruled that "the proposed labels would be a counterfeit use of the registered and recorded trademarks, and, if imported would be subject to seizure for violation of 19 U.S.C. 1526(e)." Ruling at 4.

Plaintiff maintains that the use of competitor's trademarks is permissible as comparative advertisement. It argues that the use does not constitute a violation of trademark protection if done in a truthful, non-confusing manner. *See Smith v. Chanel, Inc.,* 402 F.2d 562, 565–66 (9th Cir. 1968) ("use of another's trademark to identify the trademark owner's product in comparative advertising is not prohibited by either statutory or common law, absent misrepresentation regarding the products or confusion as to their source of sponsorship").

A. *Whether the marks are counterfeits:*

Section 1526 of Title 19 of the United States Code provides, *inter alia:*

> (a) [I]t shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise * * * bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United states * * * and if a copy of the certificate of registration of such trade-mark is filed with the Secretary of the Treasury * * *.
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> *　*　*　*　*　*　*
>
> (e) Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provision of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws * * *.

Section 1127 of Title 15 of the United States Code provides the definition of "counterfeit":

> A "counterfeit" is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.

In order to exercise its seizure authority pursuant to 19 U.S.C. § 1526 (e), Customs must determine that the merchandise is a counterfeit.

In this case, Customs made no such finding. Instead, defendant's counsel states:

> Customs appears to have assumed from [plaintiff]'s ruling request that the points [plaintiff] now raises in its brief were not disputed.

> There is nothing in the record to indicate that there was any disagreement that the famous trademarks were spuriously applied (*i.e.*, without the permission of the trademark owner), or that the marks used were not identical or substantially indistinguishable from the recorded marks.

Def's Br. at 8.

Customs' assumption is unreasonable. Nothing in plaintiff's ruling request concedes that the registered trademarks were counterfeits, exposing itself to possible liabilities for violation of § 1526. Plaintiff does not claim that the marks are used with the permission of the trademark owners. However, 15 U.S.C. § 1127 defines as counterfeit "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." Customs must make a finding that plaintiff's labels and packages are either identical with or substantially indistinguishable from registered marks in order to conclude that they are counterfeits. Nothing in the record indicates Customs made such findings.

B. *Whether the proposed packages are likely to cause confusion:*

To consider whether plaintiff's proposed packages conform with laws and regulations protecting trademarks, Customs must also consider whether plaintiff's packages are likely to cause confusion to the public. Section 1124 of Title 15 of the United States Code provides, *inter alia:*

> [N]o article of imported merchandise which shall copy or simulate the name of the [sic] any domestic manufacture, or manufacturer, or trader, * * * shall be admitted to entry at any customhouse of the Untied States * * *.

Customs' regulation defines copying or simulating marks.

> Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or trade name shall be denied entry and are subject to forfeiture as prohibited importations. A "copying or simulating" mark or name is an actual counterfeit of the recorded mark or name or is one which so resembles it as to be *likely to cause the public to associate the copying or simulating mark with the recorded mark or name.*

19 C.F.R. § 133.21(a) (1992) (emphasis added).

Defendant maintains that the likelihood of confusion is evident when the proposed packages are compared with the facsimile copies of the recorded marks. The administrative record contains the information recorded with Customs by trademark holders pursuant to 19 C.F.R. part 133. The cover sheet of the recordation describes the subject of the trademark being recorded, effective date, expiration date, the owner of the trademark, the purpose of the recordation, etc. The recordation incorporates the certified facsimile copy of the trademark in the principal registry of the Trademark Office. With respect to the trademark "Giorgio," the record provides the black and white copy of the crest design of the trademark and states that it uses yellow and white stripe design. *See* R. Docs. 7, 10, 11, 19 & 21. For "Opium" and "Youth Dew", however, the

record contains the names only which appear on the register of the Trademark Office. *See* R. Docs. 4 & 5. The record does not contain any design of the marks or the colors of these two trademarks. Plaintiff provided color copies of the packages which contained the design, color and wording it intends to use.

Defendant conceded during the oral argument that the mere use of the names registered as trademarks in and of itself is not considered a violation of trademark protection. For example, the use of the word "opium" is not a violation of trademark protection unless the use is likely to cause confusion in the context it is used. The issue of likelihood of confusion "depends upon a consideration of the facts and circumstances in each case." *Plus Prods. v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1003 (2d Cir. 1983) (citation omitted).

The court finds it arbitrary and capricious for Customs to determine that the proposed packages are likely to be confused with registered trademarks based on the materials in the record. Customs had the color copies of plaintiff's proposed packages on one hand, and, on the other hand, the name "Opium" or "Youth Dew" printed in ordinary typeface on the registration of the Trademark Office. Customs failed to provide any reasonable analysis or explanation to support its conclusion that the likelihood of confusion is evident. To make a determination, plaintiff's proposed packages should be compared with the actual packages bearing the registered trademarks or reasonable reproduction representing the design and color of the trademarks.

Customs appears to have confined itself to the comparison of plaintiff's proposed packages with the information available with the recordation without obtaining the articles bearing the registered trademarks. However, such restricted comparison has been denied as being too narrow. *See Montres Rolex, S.A. v. Snyder,* 718 F.2d 524, 532 (2d Cir. 1983), *cert. denied sub nom, Grand Jewels, Inc. v. Montres Rolex, S.A.*, 465 U.S. 1100 (1984). In *Montres Rolex,* Customs argued that § 1526(e) requires it to protect only a "registered" mark as appeared on the registration of the Trademark Office. The court upheld the trial court's decision to compare the designs on the counterfeiting goods with the mark as it appears on the actual merchandise. The court reasoned that "just as the protected mark on actual merchandise is unlikely to be identical with the two-dimensional facsimile of the mark recorded on the registration certificate, so, too, an infringing mark would be unlikely to be substantially indistinguishable from that facsimile." *Id.*

Defendant speculates that "nothing in the record indicates that Customs did not review exemplars in connection with the Ruling or were not familiar with exemplars of the famous marks." Def's Br. at 15. However, in the absence of any proof in the record that Customs did in fact compare plaintiff's proposed labels with the actual merchandise bearing the famous trademarks, the court is unable to review "whether the decision was based on a consideration of the relevant factors." *Overton Park,* 401 U.S. at 416.

Similarly, Customs' conclusion with respect to the adequacy of disclaimer is arbitrary. Plaintiff proposes to print a disclaimer at the bottom of the package stating "OUR PRODUCT IS IN NO MANNER ASSOCIATED WITH OR LICENSED BY THE MAKERS OF [registered name]." Customs determined that the disclaimer language is inadequate to remove the likelihood of confusion.

Customs relied on *Charles of the Ritz Group Ltd. v. Quality King Distributors, Inc.,* 832 F.2d 1317, 1324 (2d Cir. 1987), for the proposition that "disclaimers which employ brief negator words such as 'no' or 'not' are generally considered ineffective." Ruling at 3. Whether plaintiff's disclaimer is sufficient to counter the likelihood of confusion must also be determined in the context of the entire package. Such determination cannot be made without comparing plaintiff's proposed packages with the actual packages bearing registered trademarks or reasonable reproduction representing the design and color of the trademarks. Customs determination that the disclaimer is inadequate is arbitrary in the absence of any indication that it actually compared the packages and found the public is likely to be confused.

The finding that the proposed packages are likely to cause confusion was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law when they were merely compared with the facsimile copies of the registration of the Trademark Office.

C. *The party bearing the burden of proof:*

Defendant claims that Customs' Ruling should be upheld arguing plaintiff failed to show that its proposed packages are not likely to cause confusion among consumers. In asserting plaintiff has the burden of disproving the likelihood of confusion, defendant relies on the holdings of *Charles of the Ritz,* 832 F.2d 1317, and *Home Box Office, Inc. v. Showtime/The Movie Channel, Inc.,* 832 F.2d 1311 (2d Cir. 1987). However, these actions were brought by trademark holders to enforce trademark protection. Hence the plaintiffs in those cases had burden of proving the likelihood of confusion. The case at bar is distinguishable because it is brought by an importer who seeks to use certain trademarks in comparative advertisement. The holdings of *Charles of the Ritz* and *Home Box Office* do not answer the question whether plaintiff must disprove the likelihood of confusion to prevail before Customs.

Pursuant to 19 C.F.R. part 177, an importer may obtain Customs' ruling with respect to prospective transactions so that "commercial importers can import their products with some certainty regarding Customs treatment of their importation." T.D. 89–74, 23 Cust. B. & Dec. 352 (1989). The regulation specifically requires the request be accompanied by "photographs, drawings, or other pictorial representations of the article and, whenever possible, by a sample article * * *." 19 C.F.R. § 177.2(b)(3) (1992). Plaintiff submitted color copies of the proposed packages with its request for the Ruling. R. Doc. 1a, Ex. A. The request appears to conform the requirement set out under 19 C.F.R. § 177.2.

There is no record that Customs requested any additional information from plaintiff. Instead, Customs merely reached the information recorded by trademark holders, *i.e.*, the facsimile copies of the registration of the Trademark Office. As discussed above, the court finds the information recorded with Customs insufficient to make a proper determination in this proceeding. Under these circumstances, the court finds that Customs did not make sufficient effort to obtain enough information to make its ruling.

In addition, the court notes that Customs' own regulation states:

> The Customs Service will endeavor to issue a ruling letter setting forth a determination with respect to a specifically described Customs transaction whenever a request for such a ruling is submitted in accordance with the provisions of this part and it is in the sound administration of the Customs and related laws to do so.

19 C.F.R. § 177.8(a)(1) (1992). Under the circumstances of this proceeding, Customs should have requested more information so that it would be able to issue a ruling based on relevant factors. The issuance of the ruling without sufficient factual basis is arbitrary and capricious.

Since Customs made a clear error of judgment and the Ruling is not based on a consideration of the relevant findings of facts, the court holds that the Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

II. The Marks not Recorded with Customs

Three of the marks plaintiff intends to use, namely, "Ombre Rose," "Oscar" and "L'Air du Temps," are not recorded with Customs. Customs stated it "cannot issue a binding ruling as to [these] trademarks absent proof of registration with the United States Patent and Trademark Office." Ruling at 2. However, in its conclusion the Ruling stated if these marks are registered with the Trademark Office, "articles bearing counterfeit marks *may* be subject to seizure pursuant to 19 U.S.C. 1595a(c) for violation of 18 U.S.C. 2320." Ruling at 4 (emphasis added). The issue is whether Customs' refusal to provide a ruling with respect to non-recorded marks was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Customs has power for civil seizure under 1595a(c), which provides:

> Any merchandise that is introduced or attempted to be introduced into the United States contrary to law * * * may be seized and forfeited.

Section 2320 of Title 18 provides, *inter alia:*

> (a) Whoever intentionally traffics or attempts to traffic in goods or services and *knowingly uses a counterfeit mark* on or in connection with such goods or services shall, if an individual, be fined not more than $250,000 or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than $1,000,000 * * *.
>
> (b) Upon a determination by a preponderance of the evidence that any articles in the possession of a defendant in a prosecution

> under this section bear counterfeit marks, the United States may obtain an order for the destruction of such articles.
>
> * * * * * * *
>
> (d) For the purposes of this section—
>
> (1) The term "counterfeit mark" means—
>
> (A) a spurious mark—
>
> (i) that is used in connection with trafficking in goods or services;
>
> (ii) that is identical with, or substantially indistinguishable from a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered; and
>
> (iii) the use of which is likely to cause confusion, to cause mistake, or to deceive * * *.

18 U.S.C. § 2320.

Plaintiff challenges Customs' authority to invoke its seizure power under § 1595a(c) on the basis of 18 U.S.C. § 2320, a criminal statute. According to plaintiff, the recordation with Customs is the prerequisite for exercising Customs authority under both § 1526(e) and § 1595a(c). Plaintiff argues since Customs would not be able to obtain the information to enforce trademark law without proper recordation, it is without authority to seize the merchandise which is in violation of 18 U.S.C. § 2320.

In general, Customs has been part of the government's efforts to enforce § 2320. *See, e.g., United States v. Kim,* 963 F.2d 65 (5th Cir. 1992) (Customs agents searched residences where their owners were observed selling counterfeit bags); *United States v. Hon,* 904 F.2d 803 (2d Cir. 1990), *cert. denied,* 498 U.S. 1069 (1991) (Customs' undercover agent made contact with defendants who sold counterfeit watches). In construing 18 U.S.C. § 2320, Customs stated "[t]he criminal counterfeit trafficking statute (18 U.S.C. 2320) does not require that the counterfeited trademark be recorded with U.S. Customs as a prerequisite for the offense." Customs Directive 2310–08 at 3 (Jan. 16, 1990). Customs may seize merchandise "if there is probable cause to believe that the goods are evidence of a crime (*e.g.,* 18 U.S.C. 2320) or subject to forfeiture under customs laws." *Id.* Since trademark registry is public information, *see* 15 U.S.C. § 1051 (1988) (registration of trademarks); 15 U.S.C. § 1062 (1988) (publication of trademark registration), it does not make sense to curtail Customs' authority merely because the marks are not recorded with Customs. Customs is able to find out what marks are registered from the principal registry of the Trademark Office. The trademark holder's failure to record certain marks with Customs does not deprive Customs of its enforcement power under § 2320.

In this case, however, Customs claims it is unable to issue a ruling in the absence of the proof of the registration with the Trademark Office. Presumably, Customs should be able to obtain the information as it

would when enforcing § 2320. Absent the recordation, the court believes that Customs may obtain necessary information from the principal registry of the Trademark Office. In the alternative, Customs could request plaintiff to provide relevant information including the registration information of the marks with the Trademark Office and actual packages bearing such trademarks, if necessary. If Customs does not follow these procedures, Customs should provide an explanation as to why it did not do so. The court will, then, examine whether Customs' failure to issue a ruling with respect to non-recorded marks is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

CONCLUSION

This action having been submitted for decision and upon due deliberation, it is hereby

ORDERED that the Ruling is remanded to Customs to reconsider whether the marks recorded with Customs comply with laws and regulations protecting trademarks; it is further

ORDERED that the Ruling is remanded to Customs to investigate whether the remaining marks are registered with the Trademark Office, or, in the alternative, to provide an explanation as to why it did not do so; and it is further

ORDERED that Customs shall file its remand determination within 45 days from the date of this opinion.

(Slip Op. 93–152)

MURJANI INTERNATIONAL LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 82–02–00250

Plaintiff challenges the U.S. Customs Service's ("Customs") denials of its protests regarding the appraisal of merchandise plaintiff imported into the United States between 1979 and 1981. Plaintiff alleges that Customs improperly included quota charges as part of export value, as set forth at 19 U.S.C. § 1401a(b) (1976), for merchandise imported before July 1, 1980, and improperly included quota charges as part of transaction value, as set forth at 19 U.S.C. § 1401a(b) (1976 & Supp. III 1979), in appraising the value of merchandise imported after July 1, 1980.

Held: Defendant conceded at trial that Customs improperly included quota charges in appraising the export value of merchandise imported before July 1, 1980. Therefore, this Court directs Customs to reliquidate those entries so as not to include quota charges as part of the export value of the merchandise. For those entries made on or after July 1, 1980, Customs' denial of the protests is affirmed, as plaintiff failed to meet the burden of proof necessary to overcome the presumption of correctness accorded the defendant.

[Judgment for plaintiff in part; judgment for defendant in part.]

(Dated August 11, 1993)

Grunfeld, Desiderio, Lebowitz and Silverman (Steven P. Florsheim, Robert Silverman and *Frank Desiderio)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(John J. Mahon)* for defendant.

Opinion

Tsoucalas, *Judge:* Plaintiff Murjani International Limited, New York ("Murjani-New York"), challenges the U.S. Customs Service's ("Customs") denial of a series of protests by plaintiff, concerning the duty assessed on certain merchandise where Customs, in appraising the merchandise, included quota charges as part of the price paid by plaintiff for the merchandise. Plaintiff claims that Customs improperly included the quota charges as part of the export value, as set forth at 19 U.S.C. § 1401a(b) (1976), and improperly included the quota charges as part of transaction value, as set forth at 19 U.S.C. § 1401a(b) (1976 & Supp. III 1979), in appraising the value of the merchandise. This matter is before the Court for trial *de novo.* The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

Background

During the period 1979 to 1981, Murjani-New York imported garments into the United States from Hong Kong. Upon liquidation, Customs included the quota charges listed on the invoices from the seller, Murjani Garment Factory, Macau ("Murjani-Macau"), to Murjani-New York as part of the price paid to Murjani-Macau for the merchandise, thereby increasing the amount of duty to be paid by Murjani-New York. Plaintiff contends that such quota charges should not have been included in the price of the merchandise because it paid the exporter, Murjani Industries, Hong Kong ("Murjani-Hong Kong") for the entire invoiced amount, and that the seller, Murjani-Macau, only received from Murjani-Hong Kong the charges for the garments not the quota charges. In other words, plaintiff claims it never paid the seller of the garments for the quota charges. Transcript Record ("T.R.") at 6, 33–35.

Plaintiff protested the appraisals with Customs pursuant to 19 U.S.C. § 1514 (1988). Customs denied the protests after which plaintiff brought several actions in accordance with 28 U.S.C. §§ 2632(a), 2636(a) (1988) for the importations which occurred during the period of 1979 to 1981. These actions were consolidated under Consolidated Court No. 82–02–00250 upon agreement of both parties at trial. T.R. at 2–3.

Discussion

The statute governing these import transactions changed July 1, 1980. Hence, the transactions which occurred before July 1, 1980 are governed by "old" law. Those transactions which took place on or after July 1, 1980 are governed by "new" law.

The "old" law valuation standard was for merchandise to be appraised on the basis of export value. 19 U.S.C. § 1401a(a)(1) (1976). In that statute, export value is defined as "the price * * * at which such or similar merchandise is freely sold or * * * offered for sale in the principal markets of the country of exportation * * *." 19 U.S.C. § 1401a(b). Customs has ruled that when documentation and proof of purchase exist, quota charges are not part of the freely offered price of imported mer-

chandise and, hence, not dutiable. *See* Plaintiff's Exhibit 1 (Customs Service Internal Advice No. 177/80 (542238 TLL)). The government concedes that quota charges for the transactions which occurred prior to July 1, 1980 should not have been included in the price of merchandise because such documentation exists. T.R. at 109–10. Therefore Customs is directed to reliquidate the entries which occurred before July 1, 1980 so as not to include quota charges. *See* Schedule A attached.

The "new" law uses transaction value instead of export value as the standard for determining the dutiable value of the imported merchandise. 19 U.S.C. § 1401a(b) (1976 & Supp. III 1979). Transaction value is defined as "the price actually paid or payable for the merchandise when sold for exportation * * *." *Id.* The "price actually paid or payable" is defined at 19 U.S.C. § 1401a(b)(4)(A) as "the total payment * * * made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller."

The Court of Appeals for the Federal Circuit recently held quota charges to be part of the "price actually paid or payable" under 19 U.S.C. § 1401a(b)(4)(A). *Generra Sportswear Co. v. United States,* 905 F.2d 377 (Fed. Cir. 1990). In *Generra,* the seller was paid quota charges by the buyer's agent who then invoiced the charges to the buyer. The invoice for the quota was included with the invoice for the merchandise as part of the entry documents. Customs combined both invoices in determining the transaction value. The Court reasoned that when quota charges are paid to, or for the benefit of, the seller, such charges should be included in the transaction value as they are not specifically excluded under section 1401a(b)(3), which lists those costs that are to be excluded from transaction value. *Id.* at 379–80.

According to *Generra,* the question before this Court is simply whether the seller was paid for the quota charges. In making such a determination, we bear in mind that, by law, Customs' appraisal of the transaction is presumed to be correct. As such, the burden of proof is on plaintiff to show that Customs was incorrect in its appraisal of the merchandise imported by the plaintiff. 28 U.S.C. § 2639(a)(1) (1988). Therefore, Murjani-New York has the burden of producing evidence and persuading this Court that Murjani-Macau was not paid the quota charges which appear on the invoices to the buyer Murjani-New York.

In support of its position, plaintiff offered the testimony of a single witness, Kaiser Ahmad, an independent consultant in financial systems and international business transactions. Mr. Ahmad was formerly employed by Murjani-Hong Kong from 1974 to 1979 and by Murjani-New York from 1979 to 1990. Mr. Ahmad testified that for the transactions in question, Murjani-New York contracted with Murjani-Macau for the manufacture of women's apparel. T.R. at 16–17. Murjani-Macau would in turn subcontract with other manufacturers in Hong Kong for the manufacture of the goods. T.R. at 14–17. Murjani-Hong Kong would act as the export agent purchasing quota as necessary to export the goods to Murjani-New York. T.R. at 17, 41. Mr. Ahmad further testified that

Murjani-New York then paid Murjani-Hong Kong for the full amount of the invoice which included the charges for the goods and the accompanying quota, and that Murjani-Hong Kong retained the cost of the quota and remitted the charges for the goods to Murjani-Macau. T.R. at 34–35.

To corroborate this testimony plaintiff entered into evidence several sets of entry documents purporting to show that Murjani-New York did not pay Murjani-Macau but rather Murjani-Hong Kong.[1] Plaintiff then offered notices from the Hong Kong and Shanghai Bank of New York reflecting the sale of certain sums of Swiss francs to Murjani-New York which were payable to the account of Murjani-Hong Kong. In addition to the notices, reconciliation sheets were offered to show that the sum totals of bills from Murjani-Macau to Murjani-New York were reconciled with the claimed payments of Swiss francs to Murjani-Hong Kong. The reconciliation sheets, many handwritten, list bill numbers, invoice numbers, bill amounts and interest. Certain copies of correspondence from Murjani-New York to Murjani-Hong Kong on the subject of direct payment of Swiss francs to Murjani-Hong Kong are included among the reconciliation sheets. *See* Plaintiff's Exhibit 3.

The bank notices indicate that Murjani-New York was to remit "$CHECK" for the purchase price of the Swiss francs. However, no receipt, paid draft or other written evidence was offered to show that the transaction had been completed. Moreover, it is unclear how these records can be reconciled with each other. For example, Mr. Ahmad testified that the sum of two of the bank notices were used to retire the bills listed on sheet "A" (which, confusingly, is also labeled sheet "B"), as indicated on a handwritten master reconciliation sheet. T.R. at 47–48. Yet the master sheet reflects that different payment sums were also used to retire the same lists of bills. Mr. Ahmad was not able to clarify which sheet went with which payment. In addition, Mr. Ahmad testified on cross examination that there was nothing in the exhibit offered by plaintiff which demonstrates that Murjani-Hong Kong paid Murjani-Macau for the garments only, but that he knew such records existed. T.R. at 49–51. In other words, the documents offered to show such payments took place were confusing at best and did not corroborate the testimony of the witness. The documents which Mr. Ahmad claimed could have demonstrated such payments were made were not produced.[2]

Plaintiff also offered into evidence copies of invoices from the seller, Murjani-Macau, to the buyer, Murjani-New York, reflecting the costs of

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[1] The sets of entry documents include a consumption entry form from Customs, a carriers certificate, an invoice, a packing list, an export license, a certificate for transfer of quota, a receipt for the price of the quota issued by the transferor, and a debit note for the transfer of quota. The costs for the quota are reflected on the invoice. The transfer of quota documents indicate the permanent quota holder as the transferor and Murjani-Hong Kong as the transferee. The transfer documents also have a transfer number which is indicated on the export license – which also indicates Murjani-Hong Kong as the transferee. *See, e.g.*, Plaintiff's Unmarked Exhibit, Entry No. 80–257849–7.

[2] The entry documents offered by plaintiff indicate that Murjani-Hong Kong paid outside sources for temporary quota. One logical inference which can be drawn from such evidence in support of plaintiff's position is that Murjani-Macau would not have received payment for such quota as it was not rightfully entitled to it, as Mr. Ahmad had testified. T.R. at 33. However, such evidence speaks more directly to who was rightfully entitled to be paid for the quota and most directly to who paid for the quota. The issue in this case is whether the quota charge was paid to the seller, regardless of who paid for it or who was rightfully entitled to it. Hence, this evidence addresses the issue in this case, at best, indirectly.

the apparel, the costs for quota, and the air freight charges. *See* Plaintiff's Exhibit 4. Listed on the invoices was the following note:

> BANKER: THE HONG KONG AND SHANGHAI BANKING CORP., MACAU. "DRAFT DRAWN AT 120 DAYS D/A THROUGH MANUFACTURERS HANOVER TRUST COMPANY, NEW YORK, USA."

Accompanying the invoices were drafts reflecting the invoice numbers made out for the exact total costs listed on the respective invoice drawn by Murjani-Macau, the seller, on the Hong Kong and Shanghai Banking Corp., Macau. The draft had stamps on it indicating that it was registered for inward collection by the Hong Kong and Shanghai Banking Corp. as well as being accepted for collection by Manufacturers Hanover Trust Co., New York.

These documents did not support the testimony of plaintiff's witness. Mr. Ahmad testified that Murjani-New York never made payments to Murjani-Macau, but rather remitted directly to Murjani-Hong Kong. T.R. at 34–35. He further testified that the stamps on the draft do not indicate one way or the other whether the drafts were actually paid. T.R. at 33. This particular point was confirmed by defendant's witness, Mr. Peter Daniels, a supervisory auditor with Customs, who testified on direct examination that he would accept such a draft as evidence that payment was made to the seller, but then testified on cross-examination that an acceptance would need to be verified by a disbursements journal to show that payment was actually made after acceptance. T.R. at 102, 105–106. Had plaintiff offered such written proof to corroborate Mr. Ahmad's testimony, the evidence would be more persuasive. However, plaintiff did not present a disbursements journal or any other evidence reflecting the status of the drafts which were accepted for payment. As such, it remained the burden of plaintiff to show that such payments did not take place as indicated on the face of the invoices and drafts, i.e., that Murjani-Macau was not paid for the full amount reflected on the invoice. The Court finds that plaintiff has failed to do so.

Conclusion

Plaintiff has failed to meet its burden of proof as required by statute. 28 U.S.C. § 2639(a)(1). Plaintiff did not put forth evidence sufficient to persuade this Court that the seller was not paid for the quota charges as part of the value of the invoices, nor did plaintiff put forth evidence sufficient to persuade this Court that payments were made to another party in lieu of the seller as claimed. The presumption remains that Customs properly included the quota charges as part of the transaction value of the imports made after July 1, 1980. 19 U.S.C. § 1401a. Therefore, Customs is ordered to reliquidate entries made prior to July 1, 1980, so as to not include quota charges. *See* Schedule A attached. For entries made on or after July 1, 1980, Customs' denial of plaintiff's protests is affirmed. *See* Schedule B attached.

JUDGMENT

This case having been duly submitted for decision following trial *de novo,* and the Court, after due deliberation, having rendered a decision herein; now therefore, in accordance with said decision,

IT IS HEREBY ORDERED that the United States Customs Service ("Customs") is ordered to reliquidate the entries made prior to July 1, 1980 listed on Schedule A attached so as to not include quota charges; and it is further

ORDERED that for the entries made on or after July 1, 1980 listed on Schedule B attached, Customs' denial of plaintiff's protests is affirmed.

SCHEDULE A

Entry No.	*Entry date*	*Original Court No.*
K79-659673	9/27/79	82-04-00447
K79-662991	9/28/79	82-04-00447
K79-662992	9/28/79	82-04-00447
K80-255101	4/30/80	83-02-00174
K80-786948	5/29/80	82-12-01756
K80-786973	6/4/80	82-04-00447
K80-786978	6/4/80	82-04-00447
K80-257033	6/10/80	83-02-00307
K80-256516	6/12/80	83-05-00780
K80-256563	6/13/80	83-02-00307
K80-257078	6/16/80	83-02-00307
K80-787082	6/16/80	83-02-00307
K80-787084	6/16/80	83-02-00307
80-787128	6/23/80	83-02-00307
K80-256744	6/23/80	83-02-00307
K80-787132	6/23/80	83-02-00307
K80-787133	6/23/80	83-02-00307
80-787118	6/24/80	83-02-00174
80-787120	6/24/80	83-02-00174
80-787140	6/25/80	83-02-00174
K80-787159	6/30/80	83-02-00307
K80-787166	6/30/80	83-02-00307

SCHEDULE B

Entry No.	*Entry date*	*Original Court No.*
K80-257217	7/1/80	83-02-00307
K80-257313	7/3/80	83-02-00307
80-257386	7/7/80	83-02-00174
80-257388	7/7/80	83-02-00174
K80-257207	7/7/80	82-04-00447
K80-257391	7/7/80	82-04-00447
K80-787203	7/7/80	83-02-00307
80-257385	7/8/80	83-02-00174
80-257420	7/8/80	83-02-00174
80-257421	7/8/80	83-02-00174
80-257426	7/8/80	83-02-00174
K80-257384	7/8/80	83-02-00174
K80-257393	7/8/80	82-04-00447
K80-257413	7/8/80	82-02-00250
K80-257418	7/8/80	82-04-00447
K80-257425	7/8/80	82-04-00447
K80-257428	7/8/80	82-04-00447
K80-787233	7/8/80	83-02-00307
K80-787235	7/8/80	83-02-00307
80-257412	7/9/80	83-02-00174
80-257416	7/9/80	83-02-00174
80-787205	7/9/80	83-02-00174
80-787236	7/9/80	83-04-00496
80-257761-8	7/10/80	82-04-00447
K80-257660	7/10/80	82-04-00447
K80-257670	7/10/80	82-02-00250
80-257766	7/11/80	83-02-00174
80-257849	7/13/80	82-04-00447

SCHEDULE B—continued

Entry No.	*Entry date*	*Original Court No.*
80-257771	7/14/80	83-02-00174
80-257776	7/14/80	83-02-00174
80-257777	7/14/80	83-02-00174
K80-257770	7/14/80	82-04-00447
K80-257775	7/14/80	83-02-00307
K80-257848	7/14/80	82-04-00447
80-257720	7/15/80	83-02-00174
80-257854	7/15/80	83-02-00174
80-257860	7/15/80	83-02-00174
80-257903	7/15/80	84-11-01565
80-257904	7/15/80	83-02-00174
80-257905	7/15/80	83-02-00174
80-787266	7/15/80	83-02-00174
80-787267	7/15/80	83-04-00628
80-787268	7/15/80	83-02-00174
80-787269	7/15/80	83-02-00174
80-787270	7/15/80	83-02-00174
80-787271	7/15/80	83-04-00628
80-787273	7/15/80	83-04-00628
80-787285	7/15/80	83-04-00628
80-787287	7/15/80	83-04-00628
81-111969	7/15/80	83-02-00174
81-787272	7/15/80	83-02-00174
K80-787862	7/15/80	83-02-00307
80-257948	7/16/80	83-02-00174
80-258030	7/17/80	83-04-00496
80-258031	7/17/80	83-02-00174
80-258033	7/17/80	82-12-01756
80-258086	7/17/80	83-01-00174
K80-258028	7/17/80	83-02-00307
80-258064	7/18/80	83-04-00496
80-258083	7/18/80	83-02-00174
80-257779	7/24/80	83-02-00174
80-258487	7/25/80	82-04-00447
80-258594	7/29/80	83-04-00496
80-728167	7/30/80	82-05-00769
80-728193	8/4/80	82-05-00769
K80-787396	8/4/80	82-02-00250
K80-787408	8/4/80	82-02-00250
K80-787425	8/4/80	82-02-00250
80-787281	8/20/80	83-02-00174
K80-787544	8/22/80	83-02-00307
80-784547	8/25/80	83-04-00496
80-787564	8/25/80	83-04-00496
80-787582	8/27/80	83-02-00174
80-260054	9/2/80	83-04-00628
80-260069	9/2/80	83-05-00780
K8-1787619	9/4/80	82-12-01756
K80-260249	9/8/80	82-12-01756
K80-260453	9/8/80	83-02-00307
K80-260249	9/9/80	82-12-01756
K80-260436	9/9/80	83-02-00307
K80-260449	9/9/80	82-12-01756
K80-260521	9/9/80	82-12-01756
K80-787640	9/9/80	82-12-01756
K80-269549	9/10/80	82-12-01756
K80-260642	9/12/80	83-02-00307
K80-260766	9/16/80	82-12-01756
K81-108706	10/3/80	82-12-01756
K81-303922	10/3/80	82-04-00447
K81-303987	10/21/80	83-02-00174
K81-304008	10/21/80	82-04-00447
K81-109726	10/29/80	82-12-01756
K81-109734	10/29/80	82-12-01756
K81-109936	11/3/80	83-02-00307
K81-109937	11/3/80	82-12-01756
81-153133	11/10/80	82-05-00769
K81-110286	11/12/80	82-12-01756
K81-304144	11/13/80	82-12-01756
K81-304149	11/14/80	82-04-00447
K81-110512	11/18/80	82-12-01756
K81-110514	11/18/80	82-12-01756

SCHEDULE B—continued

Entry No.	*Entry date*	*Original Court No.*
K81-110787	11/24/80	82-12-01756
K81-304313	12/5/80	82-04-00447
81-154492	12/10/80	82-05-00651
K81-111628	12/16/80	82-12-01756
K81-111670	12/17/80	82-12-01756
81-154775	12/19/80	83-11-01676
80-111802	12/23/80	83-02-00174
81-111969	12/30/80	83-02-00174
81-154776	12/30/80	82-04-00447
81-112968	1/30/81	83-02-00174
80-257761	7/10/81	82-04-00447

(Slip Op. 93-153)

CHUNG LING CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NATIONAL KNITWEAR AND SPORTSWEAR ASSOCIATION, DEFENDANT-INTERVENOR

Consolidated Court No. 90-10-00528

[The Court holds the ITC did not exceed the instructions of the remand order and that the ITC's negative final determination is supported by substantial evidence on the record and is otherwise in accordance with law. Defendant-Intervenor's motion is denied.]

(Dated August 11, 1993)

Sidley & Austin (Judith H. Bello, Alan F. Holmer, and *Jeremy O. Preiss)* for plaintiff Cheonji Sanup, Inc.

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell, David L. Simon, and *Jeffrey S. Grimson)* for plaintiff *Comitex Knitters, Ltd.*

Whitman & Ransom (Charles H. Bayar, Dennis James, Jr. and *Kathleen F. Patterson); Charles Y.W. Chiu,* of counsel, for plaintiff *Chung Ling Co., Ltd.*

Office of General Counsel, United States International Trade Commission *(Lyn M. Schlitt,* General Counsel, *James A. Toupin,* Assistant General Counsel, and *Andrea C. Casson),* for defendant.

Gibson, Dunn & Crutcher (Joseph H. Price, Judith A. Ott, Donald Harrison, and *Jerry S. Fowler, Jr.)* for defendant-intervenor.

OPINION

CARMAN, *Judge:* Defendant-Intervenor contests the International Trade Commission's remand results in *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, The Republic of Korea, and Taiwan,* USITC Pub. 2577, Views on Remand in Inv. Nos. 731-TA-448-450 (1992) (Remand Determination). Plaintiffs and defendant seek to have the remand determination sustained. The Court retained jurisdiction over this matter during the pendency of the ITC's remand investigation.

BACKGROUND

In 1990, the ITC determined that an industry in the U.S. was materially injured by reason of imports of certain sweaters. *Sweaters Wholly or*

in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2312, Inv. Nos. 731–TA–448–450 (1990) (1990 Determination). Plaintiffs appealed the ITC's final determination, and this Court remanded the case to the ITC. *Chung Ling Co. v. United States,* 16 CIT ___, 805 F. Supp. 45 (1992) *(Chung Ling I).*

In *Chung Ling I,* the Court held that the 1990 final determination was not supported by substantial evidence on the record and was not otherwise in accordance with law. *Id.* at ___, 805 F. Supp. at 56. The Court remanded the case and ordered the Commission to review four broad areas: (1) producers' questionnaire data and the adverse inference rule; (2) petitioner's interference with the investigation; (3) causation; and (4) like product. *Id.* at ___, 805 F. Supp. at 50–56. The Court ordered the following concerning the adverse inference rule issue:

> On remand, the Commission may conduct any further investigation deemed warranted to obtain data representative of the [man made fiber (MMF)] sweater producers' pricing and the financial condition of the MMF sweater "industry," as defined in the statute; and/or, the Commission may apply the adverse inference rule against the domestic industry.

Id. at ___, 805 F. Supp. at 50.

With respect to the issue of petitioner's interference with the investigation, the Court held:

> In sum, it is the [C]ourt's view that in these investigations NKSA exceeded permissible bounds of communication with its members in aid of the Commission's investigatory responsibilities. In view of NKSA's obviously pervasive and suggestive communications with the domestic industry and the Commission's erroneous finding of a single innocuous contact between NKSA and one of its members, a remand on the interference issue is plainly warranted. On remand, the Commission is directed to conduct a further investigation of NKSA's interference with the questionnaire responses, reevaluate whether "this is a case in which * * * objectivity [of the questionnaire response data] has been compromised," *ITC Report* at 27, n. 77, and reconsider whether to draw an adverse inference.

Id. at ___, 805 F. Supp. at 52.

The Court ordered the following concerning the issue of causation:

> Due to the flawed pricing definitions in the questionnaire instructions, as described above, the record is not clear concerning that matter. Additionally, the U.S. producer pricing data was inadequate for a thorough underselling analysis. Remand for further investigation and/or clarification of U.S. producer pricing and the importers' net f.o.b. purchase prices is warranted.

Id. at ___, 805 F. Supp. at 54 (citation omitted).

Finally, with respect to the like product issue, the Court held:

> In short, the Commission's like product analysis is supported by substantial evidence and is otherwise in accordance with law, except as pertains to the issue of blends. The [C]ourt must agree with

> Taiwan plaintiffs['] contention that the Commission's finding of a clear dividing line in the U.S. sweater industry based on fiber composition predicated on the minor position of blends in the market is unsupported by substantial evidence. The Commission's finding of the minor position of blends was significant in the determination of the like product under the clear dividing line standard * * *. The [C]ourt holds that the Commission's like product determination, insofar as it was based on a finding of the minor position of blends in the U.S. market, is unsupported by substantial evidence and is remanded for further investigation and/or reconsideration.

Id. at ____, 805 F. Supp. at 56. The Court concluded *Chung Ling I* by stating that "[o]n the present agency record, the Commission's final injury determinations are unsupported by substantial evidence and are otherwise not in accordance with law." *Id.* at ____, 805 F. Supp. at 56.

On September 25, 1992, this Court issued a memorandum and order denying defendant's motion to amend *Chung Ling I's* remand order. *Chung Ling Co. v. United States*, 16 CIT ____, 805 F. Supp. 56 (1992) (*Chung Ling II*). *Chung Ling II* further explained the Court's remand instructions. In its discussion of "Producers' Questionnaire Data and Adverse Inference," the Court stated:

> due to the low rate of and incomplete responses, the producer questionnaire data was inadequate to furnish the Commission with any semblance of representative data in critical financial indicators of injury and causation. More, the [C]ourt pointed out that the supplementary information resorted to by the Commission—Bureau of Census statistics was also inadequate to supply much critical information that was required for an accurate injury determination. In short, the Commission's final investigations, while clearly "diligent," were *inadequate.*

Id. at ____, 805 F. Supp. at 61 (emphasis in original). Continuing its discussion of the questionnaire data, the Court stated that the remand order "was couched to afford the Commission wide latitude and discretion in further investigation and/or drawing of an adverse inference." *Id.* at ____, 805 F. Supp. at 64.

The Court also reviewed its instructions regarding the Commission's like product determination.

> In [*Chung Ling I*] this [C]ourt held that the Commission's finding of the minor position of blends in the U.S. sweater market and the significance of that fact in overall like product analysis warranted further investigation and/or reconsideration by the Commission on remand. It is the Commission's responsibility to assess *in light of the overall record* the *significance* of the position of blends in the U.S. sweater market and, in light of the current record, to what extent if any, further investigation of that factual issue is indicated.

Id. at ____, 805 F. Supp. at 65 (emphasis in original). The Court concluded its discussion of its remand order by stating that "[u]nder the broad terms of the remand order in [*Chung Ling I*], the Commission

must be the sole judge of what, if any, further data acquisition efforts are justified * * *." *Id.* at ___, 805 F. Supp. at 67.

Following remand, the ITC issued revised questionnaires to domestic producers and received briefs from the parties. The Commission subsequently unanimously determined that an industry in the United States was not materially injured or threatened with material injury by reason of the subject imports. Remand Determination at 1. Four of the Commissioners, Vice-Chairman Watson and Commissioners Brunsdale, Nuzum[1] and Crawford, had not participated in the 1990 Determination and reviewed the entire record in the remand investigation *de novo. Id.* at 1 n. 3. Chairman Newquist joined these four Commissioners, and also readopted his dissenting views from the 1990 Determination. *Id.* at 1 n. 4; *see* 1990 Determination at 55–71. Although Commissioner Rohr reached a negative determination, he did not join in the views of the other five Commissioners. Remand Determination at 1 n. 1, 47–51. Instead, he drew a "no injury" adverse inference against the domestic industry based on his finding that the financial and pricing data on the record had not measurably improved over that collected in the original determination. *Id.* at 47–53.

Contentions of the Parties

Defendant-Intervenor, NKSA, contends that the ITC's unanimous negative determination on remand exceeded the scope of this Court's remand order. NKSA maintains the ITC exceeded the scope by making a *de novo* injury determination instead of limiting itself to supplying an institutional response to the four specific issues the Court ordered it to consider on remand. NKSA requests that this Court disregard the Commission's unauthorized and extraneous findings. According to NKSA, once these findings are disregarded, that part of the Commission's findings that NKSA claims were responsive to the specific remand issues, will support the original determination. NKSA argues in the alternative that if the Court were to accept the Commission's decision to consider the entire case *de novo,* the negative determination is not supported by substantial evidence and is not otherwise in accordance with law.

Plaintiffs and defendant argue that the ITC properly conducted the remand investigation within the scope of the remand order. Furthermore, plaintiffs and defendant maintain the negative remand determination is supported by substantial evidence on the record and is otherwise in accordance with law.

Standard of Review

"This Court possesses the power to remand cases to the ITC pursuant to 28 U.S.C. § 2643(c)(1) (1988). The appropriate standard of review on remand is whether the ITC's remand determination is based upon substantial evidence on the record or is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988)." *Trent Tube Div. v. United States,*

[1] Commissioner Nuzum submitted additional views in order to provide further detail of her analysis with respect to certain issues. Remand Determination at 53.

14 CIT 780, 783, 752 F. Supp. 468, 472 (1990) *(Trent Tube II), aff'd, Trent Tube Div. v. Avesta Sandvik Tube,* 10 Fed. Cir. (T) ____, 975 F.2d 807 (1992) (citation omitted). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

Discussion

There are two issues before the Court: (1) whether the Commission complied with the Court's remand instructions and (2) whether the remand determination is supported by substantial evidence on the record and is otherwise in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1988).

A. Remand Instructions

Defendant-Intervenor correctly states that this Court has the power both to remand an ITC determination and to set specific parameters as to what the ITC is to consider in a particular remand. Defendant-Intervenor's Brief at 6 (citing *Trent Tube,* 10 Fed. Cir. (T) at ____, 975 F.2d at 814). This Court finds, however, that the ITC has not exceeded the limit of the remand as set by this Court.

NKSA contends the Commission exceeded the scope of the remand order by improperly reexamining all issues *de novo.* Thus, defendant-intervenors argue, the ITC unilaterally expanded the scope of the remand order resulting in a determination that is not in accordance with law. The Court disagrees with NKSA's argument and finds the instant issue of *de novo* review to be strikingly similar to the *de novo* review issue addressed by this Court in *Trent Tube II,* 14 CIT at 787, 752 F. Supp. at 474.

The Court remanded *Trent Tube I* to the ITC for an explanation of Chairman Liebler's method of analysis. *Trent Tube Div. v. United States,* 14 CIT 386, 403, 741 F.Supp. 921, 935 (1990) *(Trent Tube I).* The Court found that only certain parts of Chairman Liebler's determination were in error, but held the Liebler opinion *as a whole* was not supported by substantial evidence on the record and was not otherwise in accordance with law. *Id.* at 391, 741 F. Supp. at 927. On remand Commissioner Newquist, who succeeded Chairman Liebler, declined to examine Liebler's so-called "five factor" test. He considered the case *de novo* and made an affirmative finding of injury as opposed to Liebler's original finding of no injury. *Trent Tube II,* 14 CIT at 787, 752 F. Supp. at 474.

The facts of *Trent Tube* parallel those of the instant case. In both cases the Court found only certain areas of the determinations were in error, but held each determination as a whole to be unsupported by substantial evidence. In addition, based on the questions raised by the Court in each case's remand order, the new commissioners could not support the former commissioners' findings and considered the case *de novo.*

As the Court stated in *Trent Tube* in response to defendant-intervenor Avesta's argument that the ITC should follow the partial work product of Chairman Liebler:

> It is not the role of this Court to diminish the fact-finding role of the agency in such a manner; such action would undermine the principal long recognized by this Court that it 'may not substitute its judgment for that of the [agency] * * *.' *American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom., Armco, Inc. v. United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). *The purpose of a remand generally is to require the agency to explain its determination or where appropriate, correct its determination.*

Id. at 780–81 n. 1, 752 F. Supp. at 469–70 n. 1 (emphasis added) (citation omitted). The commissioners in the instant case found it necessary to correct the determination. Just as the Court of Appeals for the Federal Circuit affirmed the ITC's remand decision in *Trent Tube,* this Court concludes that based on the broad language of the remand, the commissioners properly considered *Chung Ling de novo. See also SCM Corp. v. United States,* 2 CIT 1, 7, 519 F. Supp. 911, 915–16 (1981), *appeal after remand,* 4 CIT 7, 544 F. Supp. 194 (1982).

1. *Like Product:*

In *Chung Ling I,* the Court agreed with plaintiffs' argument that the ITC's "finding of a clear dividing line in the U.S. sweater industry based on fiber composition predicated on the minor position of blends in the market" was not supported by substantial evidence. Therefore, the Court remanded this issue concerning like product for "further investigation and/or reconsideration." *Chung Ling I* 16 CIT at ____, 805 F. Supp. at 56.

Pursuant to the remand order, the Commission further investigated the dividing line issue through the use of revised questionnaires. Those domestic sweater producers that had initially provided usable responses were asked to respond to specific questions concerning the production of blends. The Commission then reconsidered the dividing line it had drawn based on fiber composition and determined that "fiber does not serve as a 'clear dividing line.'" Remand Determination at 10 (footnote omitted). Therefore, the ITC "determined that the like product consists of all sweaters, regardless of fiber."[2] *Id.* at 8 (footnote omitted). The Court holds the ITC's review of the like product issue did not exceed the scope of the remand order.

2. *Producers' Questionnaire Data and the Adverse Inference Rule:*

With respect to the issue of producers' questionnaire data and the adverse inference rule, the Court in *Chung Ling I* stated that "the Commission may conduct *any further investigation* deemed warranted to obtain" the data required by the statute. 16 CIT at ____, 805 F. Supp. at

[2] Commission Rohr readopted his views on like product and domestic industry contained in the original investigation. He thus found the like product to be MMF sweaters.

50 (emphasis added). The Court emphasized the broad latitude given the ITC with respect to this issue, stating that the remand order "was couched to afford the Commission wide latitude and discretion in further investigation and/or drawing of an adverse inference." *Chung Ling II,* 16 CIT at ____, 805 F. Supp. at 64.

As directed by the remand order, the ITC conducted further investigation by sending out revised questionnaires, asking domestic producers to provide financial and pricing information for the categories of MMF sweaters and all sweaters. Remand Determination at 5. Commissioner Rohr drew an adverse inference against the domestic industry. Id. at 49. The other four commissioners did not find it necessary to draw an adverse inference, and instead reached a negative determination based upon the pricing and financial information that was received in both the original and remand investigations. *Id.* at 12, 14. The Court holds that the ITC did not exceed the scope of the review in its consideration of producers' questionnaire data and the adverse inference rule.

3. *Petitioner's Interference with Investigation:*

The Court used equally broad language in its remand of the issue of petitioner's interference with the investigation. The Court directed the ITC to "further investigat[e]" and "reevaluate" NKSA's interference with the questionnaire responses, leaving the option open for the ITC to draw an adverse inference. *Chung Ling I,* 16 CIT at ____, 805 F. Supp. at 52.

The ITC further investigated petitioner's interference by asking domestic producers a number of questions concerning contacts by NKSA. If the producers had any contacts, the ITC asked whether those contacts had influenced their questionnaire responses. Remand Determination at 5. In addition, the ITC subpoenaed NKSA, requesting it to provide information concerning any activities and/or communications it had with producers. *Id.* at 16 n. 46. The subpoena also required NKSA to supply the ITC with names of all firms which it contacted concerning the questionnaire. *Id.* The Commission concluded "that the totality of NKSA's contacts d[id] not exceed permissible informational and promotional activities designed to increase the producer response rate."[3] *Id.* at 19. The Court holds the ITC's further investigation and reevaluation of petitioner's interference with the investigation is within the scope of the remand order.

4. *Causation:*

The Court ordered the Commission to "further investigate and/or clarif[y]" the pricing data with respect to the issue of causation. *Chung Ling I,* 16 CIT at ____, 805 F. Supp. at 54. In response to this order, the Commission "requested importers to verify or correct the pricing infor-

[3] In his "Separate Views," Commissioner Rohr similarly concluded that there was nothing improper in NKSA's activities. Remand Determination at 51. In her "Additional Views," Commissioner Nuzum stated that although "the objectivity of the information received by the Commission was not compromised," one document sent out by NKSA contained inappropriate references. Remand Determination at 53.

mation they had submitted during the final investigations so that it reflected f.o.b. prices at the U.S. port of entry." Remand Determination at 6.

NKSA argues that the Commission exceeded the Court's remand instructions by reconsidering issues that the Court had already decided and thereby violated the mandate rule and law of the case doctrine. NKSA quotes the following language to support its argument: "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." Defendant-Intervenor Brief at 8, quoting *Key v. Sullivan,* 925 F.2d 1056, 1060 (7th Cir. 1991). The law of the case doctrine holds that "a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE paragraph 0.404 [1] (2d ed. 1992) (footnote omitted).

Defendant-Intervenor's argument is inapplicable in this case because the Court concluded in its order that "the Commission's final injury determinations [were] unsupported by substantial evidence and [were] otherwise not in accordance with law." *Chung Ling I,* 16 CIT at ____, 805 F. Supp. at 56. The Court did not expressly or by necessary implication decide the issues before it in *Chung Ling I.* Instead, the Court provided the Commission with a broad remand in order to allow the ITC to address the various areas troubling the Court.

Chung Ling II further explained the Court's remand instructions in *Chung Ling I.* After addressing the four areas of remand, the Court concluded by stating that "[u]nder the *broad terms* of the remand order in [*Chung Ling I*], the Commission must be the sole judge of what, if any, further acquisition efforts are justified * * *." *Chung Ling II* 16 CIT at ____, 805 F. Supp. at 67 (emphasis added). Based on the above analysis, it is clear that the Commission complied with the Court's remand instructions. It is now necessary to analyze whether the conclusions the Commission reached on remand are supported by substantial evidence on the record and are otherwise in accordance with law.

B. SUBSTANTIAL EVIDENCE ANALYSIS

Defendant-Intervenor contends that even if the Court rejects its argument that the ITC exceeded the remand instructions, the Court should still remand the matter back to the ITC because the Commission's determination is not supported by substantial evidence and is not otherwise in accordance with law.

"Substantial evidence 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984), quoting *Consolo v. Federal Maritime Comm'n.* 383 U.S. 607, 619–20 (1966) (other citation omitted).

1. *Due Process:*

Defendant-Intervenor claims that the Commission did not spend enough time in its consideration of this case on remand and thereby deprived NKSA of its due process rights. NKSA points to the relatively short time period of the remand investigation as evidence of the Commission's failure to properly consider the case. The Court disagrees with NKSA. The 1992 determination was built upon the record and proceedings of the 1990 determination. Therefore, there was no need for a longer time period as much of the work had already been completed during the initial determination.

The Court agrees with defendant-intervenor's statement that "[n]otice and an opportunity to be heard are the foundations of due process of law." However, contrary to defendant-intervenor's contention, the Court finds that the ITC gave NKSA due process of law. NKSA received adequate notice regarding the remand. Furthermore, NKSA had ample opportunity to participate, and in fact, took full advantage of this opportunity by participating in the following ways: NKSA submitted briefs in the original investigation which became part of the record that the Commission considered; NKSA participated in the conference and hearing in the original investigation, the transcripts from which were reviewed by the Commission; NKSA comments were incorporated into the original staff report which was also reviewed by the Commission; and NKSA provided further comments in response to the remand and to new evidence introduced during the remand proceedings. *Chung Ling Transcript* at 29 (April 20, 1993).

2. *Like Product:*

"Like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to [ ] investigation." 19 U.S.C. § 1677(10) (1988). After being directed by the Court on remand to investigate further and/or reconsider its finding of the minor position of blends, the Commission determined that the like product consists of all sweaters, regardless of fiber. NKSA argues that the Commission's like product analysis is too short and that certain key aspects of the determination not supported by substantial evidence on the record.

The Commission found that sweaters, whether made of MMF or natural fibers, are worn for warmth and fashion. Remand Determination at 10; 1990 Determination at A-7, A-9. Consumers' purchase decisions were found to be based not only on fiber content, but on fashion and novelty features as well. Remand Determination at 10; 1990 Determination at A-11; Transcript of August 9, 1990 Hearing (R. Doc. 341) at 174–75 ("Is it the right fashion statement for them. I think that's the biggest single factor."). Additionally, the ITC determined that sweaters of all fibers are sold through the same channels of distribution. Remand Determination at 9–10; R. Doc. 341 at 166, 174–75.

In its remand analysis, the Commission determined that the general processes involved in making sweaters of any type of fiber are the same.

Remand Determination at 9, citing 1990 Determination at A-9. Although production of natural fiber sweaters requires the use of additional equipment, the Commission found that the equipment could be purchased relatively inexpensively. *Id.* at 9, citing 1990 Determination at A-29 ("Petitioners commented at the hearing that, because of the current overcapacity in the sweater industry, there is a glut of used machinery on the market."). In further support of its determination, the ITC pointed to the fact that the same production and related workers, as well as the same facilities, are used in the production of both MMF and natural fiber sweaters. *Id.*, citing 1990 Determination at A-29, A-40. The ITC further determined that MMF sweaters are priced competitively with natural fiber sweaters. *Id.* at 10 citing 1990 Determination at A-11.

The like product analysis is based on the unique facts of each case. *Asociacion Colombiana de Exportadores de Flores v. United States,* 12 CIT 634, 638, 693 F. Supp. 1165, 1169 (1988). The weight to be given each factor is within the ITC's discretion. However, the ITC must supply the rationale for its determination and base its determination on substantial evidence on the record. The Court holds the Commission's determination that the like product consists of all sweaters, regardless of fiber, is supported by substantial evidence in the record and is otherwise in accordance with law.

3. *Material Injury:*

The Commission originally found the like product to be MMF sweaters and based its material injury and threat of material injury on the MMF sweater industry. However, the ITC subsequently determined on remand that the like product is all sweaters. Thus, due to the change in the relevant like product, the Commission was required to determine whether the all sweater industry is materially injured by reason of the less than fair value imports as required by 19 U.S.C. § 1673d(b) (1988). The ITC first assessed the condition of the domestic industry by considering "all relevant economic factors which have a bearing on the state of the industry in the United States * * *." 19 U.S.C. § 1677 (7)(C)(iii) (1988). It did not, however, make a separate finding of material injury in this discussion. Instead, the Commission used its condition of the industry discussion as background information for its causation analysis and subsequently made a finding of no material injury *by reason of* the less than fair value imports.

The Commission first discussed the change in consumer preferences. It noted that there has been a shift in consumer tastes toward sweaters with more intricate designs and patterns and cotton sweaters. Remand Determination at 23, citing 1990 Determination at A-19. The ITC found that foreign producers were better able to produce "fancier sweaters requiring more handwork," whereas the domestic producers tended to produce sweaters using basic yarns and style. *Id.* at 23, citing 1990 Determination at A-69. The Commission also noted a shift towards fleecewear and other knitwear as a result of an overall decrease in consumer demand for sweaters. *Id.* at 24.

In addition, the ITC addressed the ease of entry and exit for most firms in the global sweater industry. *Id.* at 24; 1990 Determination at A-29-30. Although stating the Multifiber Arrangement does not necessarily preclude injury to the domestic industry by reason of imports, the Commission acknowledged the Arrangement's purpose of preventing market disruption in importing countries. Remand Determination at 25. After analyzing the financial data obtained on remand, the Commission found that this data revealed a mixed picture. *Id.* at 27.

Although there was a loss of domestic market share during the relevant time period, the Commission found no corresponding significant increase in market share by the subject imports. *Id.* at 30–31; 1990 Determination at A-59, Table 17. The ITC found that U.S. consumption of sweaters decreased in quantity during the relevant period. Remand Determination at 25. In addition, the substitutability of the domestic sweaters for the imported sweaters diminished as the demand for more complicated styles and special yarns increased. *Id.* at 32. Based on its analysis of these factors, the Commission found that demand for domestic sweaters would not have increased substantially had the subject imports been traded fairly.

The Commission concluded its discussion by determining that the domestic industry is not materially injured by reason of the subject imports. Despite defendant-intervenor's assertion that the Commission's discussion is based on conclusory statements, the Court holds that the Commission's determination is based on substantial evidence and is otherwise in accordance with law.

NKSA also argues with respect to the causation issue that the Commission's determination is not supported by substantial evidence on the record due to the exclusion of Jia Farn Manufacturing Company's import volume figures. The Commission excluded these figures on the ground that Jia Farn received a zero margin during the Department of Commerce investigation. *Id.* at 30 n. 85. NKSA points to Commerce's initiation of a changed circumstances review to determine whether Jia Farn has changed its method of operation as reason for including Jia Farn in the instant determination. However, the period covered in the Jia Farn changed circumstances review begins after the period of investigation in the Commission's 1990 Determination and Final Determination ends. The Jia Farn review period began on April 27, 1990, whereas the period of investigation in the case before the Court ended December 31, 1989. Thus, NKSA's argument fails. *See Sweaters Wholly or in Chief Weight of Manmade Fiber from Taiwan; Initiation of Changed Circumstances Antidumping Duty Administrative Review* 57 Fed. Reg. 43,705 (1992).

4. *Threat of Material Injury:*

The final issue to be addressed is whether the Commission's determination of no threat of material injury by reason of the subject imports is based on substantial evidence. The Commission considered the relevant

economic factors in its analysis as directed by 19 U.S.C. § 1677(7)(F)(i) (1988).

The Commission found that during the period of investigation, Hong Kong and Korea virtually filled their quota limits for the subject imports and that Taiwan also had a high percentage of its quota filled. Remand Determination at 41–42; 1990 Determination at A-15. In addition, the ITC pointed out the existence of bilateral agreements between the U.S. and each of the three countries which either did not permit imminent, significant increases in subject imports (Hong Kong and Korea), or did not permit any increases at all for MMF sweaters (Taiwan). The ITC thus found the presence of the bilateral agreements would make it virtually impossible for penetration of the subject imports to rise to an injurious level.

Neither its analysis of price suppression and depression nor its evaluation of inventories of the subject merchandise provided the Commission with evidence indicating threat of material injury. Therefore, the Commission made a negative determination regarding the threat of material injury to the domestic injury by reason of the subject imports.[4] The above discussion of the Commission's analysis demonstrates that the negative determination is based on substantial evidence and is otherwise in accordance with law.

Conclusion

After considering all of defendant-intervenor's arguments, the Court holds that the International Trade Commission did not exceed the instructions of the remand order. Additionally, the Court holds that the Commission's negative final determination is supported by substantial evidence on the record and is otherwise in accordance with law. Therefore, the Court denies defendant-intervenor's motion and sustains the Commission's negative final determination in *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, The Republic of Korea, and Taiwan,* USITC Pub. 2577, Views on Remand in Inv. Nos. 731–TA–448–450 (1992).

Schedule of Consolidated Cases

1. *Cheonji Sanup, Inc. v. United States,* Court No. 90–10–00563.
2. *Comitex Knitters, Ltd. v. United States,* Court No. 90 10–00558.

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[4] Commissioner Rohr, in his "Separate Views," also concluded that there was no threat of material injury to the domestic industry.

(Slip Op. 93–154)

TOYOTA MOTOR SALES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYSTER CO., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–03–00134

[Plaintiff's motion for judgment on the agency record is denied with respect to the following four issues: (1) selling general and administrative expenses incurred by Toyo in connection with the replacement of for lift masts; (2) liquidated for lift truck entries; (3) trading company markups; and (4) conversion of Toyo's containerization expenses from Japanese yen into U.S. dollars.]

(Dated August 11 1993)

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II and *L. Daniel Mullaney)* for plaintiff Toyota Motor Sales, Inc.

O'Melveny & Myers (Greyson Bryan, Craig L. McKee and *Bruce Hirsh)* for plaintiff Toyo Umpanki Co., Ltd.

Frank W. Hunger, Assistant Attorney General, *David Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(Jeffrey M. Telep), Patrick Gallagher,* Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Man T. Staley and *Joanna K. McIntosh)* for defendant-intervenors.

OPINION

CARMAN, *Judge:* Plaintiff moves for judgment upon the agency record pursuant to Rule 56.1 of this Court.[1] Toyo Umpanki contests the final results of the antidumping administrative review, *Certain Internal-Combustion, Industrial Forklift Trucks from Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 3,167 (1992) *(Final Determination).* The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Commerce published an antidumping duty order covering certain internal-combustion forklift trucks from Japan on June 7, 1988, and a notice of an initiation of administrative review of the antidumping duty order on July 25, 1989. *See Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value; Certain Industrial Internal-Combustion Forklift Trucks from Japan,* 53 Fed. Reg. 20,882 (1988) *(Antidumping Order); Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 54 Fed. Reg. 30,915 (1989).

Commerce requested Toyo, one of the companies covered by the review, to include all expenses related to further production in the United

[1] On July 23, 1993, this Court granted relief brought on by a motion by which all of the parties consented to the remand of several issues. With respect to Toyo Umpanki, the following matters were remanded: (1) a circumstance-of-sale adjustment for certain selling expenses; and (2) the inclusion of credit income in the calculation of U.S. price. The Court also remanded all issues raised by Toyota Motor Sales. The Toyota issues were as follows: (1) whether Commerce properly allocated U.S. brokerage and handling, inland freight, and warranty expenses to the forklifts subject to the administrative review; and (2) whether Commerce properly recategorized Toyota's home market direct warranty expenses. Only four issues raised by Toyo Umpanki remain.

States. R.Doc. 167. As requested, Toyo reported all costs of further production, but listed the selling, general and administrative (SG&A) expenses as negative costs. R.Doc. 260 at 2547–48. Commerce determined that because SG&A expenses are either positive or nonexistent, negative SG&A cannot exist. *Final Determination* at 3,177. Therefore, in the final determination, Commerce used the absolute value of the negative SG&A expenses reported by Toyo to account for value-added SG&A expenses in the U.S. value-added calculation. *Id.*

Commerce also requested Toyo to supply information on purchase price transactions with sale dates prior to the period of review, but with entry dates during the period of review. R.Doc. 24 at 197. Toyo failed to provide information on these liquidated entries, and as a result, Commerce used the best information available to calculate a dumping margin for unreported, liquidated entries made by C. Itoh Machinery (one of Toyo's related companies). R.Doc. 415 at 2,152; Conf. Doc. 130; Conf. Doc. 131; *Final Determination* at 3177.

Toyo reported an additional amount which it labelled "trading company mark-up." This amount represented payments made by Toyo to its related importers, TAM and CIM. R.Doc. 111 at 372–74; Conf. Doc. 45 at 266A–267A. Plaintiff sought to have the mark-ups treated as an indirect selling expense because it claimed such funds were intra-company transfers. *Final Determination* at 3,178. Commerce determined the trading companies performing the services are directly related to CIM and TAM, and therefore only indirectly related to Toyo, and that the services performed were directly connected with the movement of forklift trucks from Japan to the United States. *Id.* Commerce determined that the mark-ups represented "actual expenses relating to the movement of forklifts which would be incurred as an expense regardless of [the] relationship of the party performing the service to [Toyo], TAM, or CIM." *Id.* at 3,178–79.

Commerce directed Toyo to report expenses in the currency in which they were incurred, but Toyo failed to submit updated computer formatting instructions. Due to this problem a decimal point was wrongly inserted into certain of Toyo's reported costs, making the figures appear to be in dollars rather than yen. As a result, Commerce miscalculated containerization fees, Japan brokerage and handling, foreign inland freight, and the value added expenses involving the removal and installation of forklift masts. Conf. Doc. 148 at 1126A–27A, 1131A–33A, 1138A, 1140A–42A.

Commerce published the preliminary results of its review on May 23, 1991. *Certain Internal-Combustion, Industrial forklift trucks from Japan; Preliminary Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 23,675 (1991). Subsequent to Commerce's publication of the Final Determination, plaintiff commenced this action.

Contentions of the Parties

Plaintiff contends Commerce's determination with respect to the following four issues is not supported by substantial evidence and is other-

wise not in accordance with law: (1) Commerce's use of the absolute value of the negative U.S. SG&A expenses reported by Toyo; (2) Commerce's inclusion of liquidated forklift truck entries in the weighted-average margin calculation; (3) Commerce's decision to deduct trading company mark-ups directly from U.S. price; and (4) Commerce's failure to convert Toyo's containerization expenses from Japanese yen into U.S. dollars.

Commerce responds to plaintiff's contentions as follows: (1) the SG&A expenses incurred by Toyo in connection with the replacement of forklift masts should be subtracted from the U.S. price; (2) Toyo's liquidated forklift truck entries were subject to review for purposes of calculating U.S. price and deposit rates for future entries; (3) the trading company mark-ups that plaintiff disputes were actually movement expenses and were thus properly deducted; and (4) Commerce is not required to correct Toyo's failure to report its containerization expenses in yen. Defendant maintains that its determination below was supported by substantial evidence on the record and is otherwise in accordance with law.

Additionally, defendant-intervenor argues that Commerce made an error in its dumping calculations by failing to calculate dumping margins for trucks sold by TAM. Defendant-Intervenor requests that on remand Commerce be instructed to calculate dumping margins for all of Toyo's liquidated entries using BIA.

Standard of Review

A final antidumping determination by Commerce will be held unlawful by this Court if it is unsupported by substantial evidence on the record or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Reiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

The Court must accord substantial weight to the agency interpretation of the statute it administers. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). "An agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable.'" *ICC Indus., Inc. v. United States,* 5 Fed. Cir. (T) 78, 85, 812 F.2d 694, 699 (1987) (emphasis in original) (citation omitted). Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984) (footnote omitted).

Discussion

A. *Selling, General & Administrative Expenses:*

In calculating U.S. price, Commerce must take into account any value which is added to the merchandise before being sold to an unrelated party:

> **(e) Additional adjustments to exporter's sales price.** – For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of –
>
> * * * * * * *
>
> (3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3) (1988). To calculate U.S. price when there has been a decrease in the cost of the merchandise as imported, it is necessary to adjust the price of the merchandise as sold upward in order to reflect the decrease. *See Timken Co. v. United States,* 14 CIT 753, 755–56 (1990).

After the merchandise at issue was imported into the United States, Toyo replaced the forklift masts with cheaper masts. Commerce adjusted for the resulting diminution in the cost of the forklifts by adding the difference in cost to the price paid by the U.S. customer in order to calculate exporter's sales price. Toyo argues that just as Commerce treated the substitution of a cheaper mast as a negative cost, so should it treat the SG&A expenses associated with removing the masts. Thus, according to Toyo, Commerce should not have deducted the absolute value of the SG&A expenses, but should have subtracted from U.S. price a "negative cost increase." Toyo Brief at 12.

Commerce treated factory overhead, labor and SG&A expenses in the same manner due to the fact they are all costs actually incurred in the process of mast substitution. Defendant distinguishes the mast substitution from the related SG&A expenses, because the SG&A expenses do not detract from the value of the forklifts as the substitution does. In addition, defendant characterizes the SG&A expenses as value adding expenditures necessary for facilitation of the sale. The Court finds defendant's argument persuasive.

Although plaintiff argues SG&A expenses should be treated as negative costs, it concedes that labor and factory overhead costs incurred in replacing the masts are actual costs that were properly assigned positive values. For purposes of calculating exporter's sales price, there is no basis for distinguishing between these expenses. The Court holds Commerce's determination with respect to the issue of SG&A expenses is based on substantial evidence on the record and is otherwise in accordance with law.

Alternatively, Toyo argues that if Commerce rejects its contention negative SG&A expenses do exist, Commerce should at least consider a

method of allocating SG&A "that ensures total SG&A allocated to a transaction does not exceed the amount actually incurred by [Toyo] on that transaction." Toyo Brief at 20. Plaintiff contends Commerce should not use as BIA the absolute value of the negative SG&A expenses. Instead, plaintiff maintains, Commerce should have used the calculation methodology suggested by Toyo in its clerical errors submission. This methodology would result in positive SG&A allocations. Conf. Doc. 155. The Court finds plaintiff's argument to be without merit.

Commerce needed to account for the SG&A expenses relating to Toyo's further manufacturing operations, but plaintiff only provided it with improperly reported negative SG&A expenses. It was therefore necessary for Commerce to use the best information available (BIA). "[B]ecause Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference." *See Allied-Signal Aerospace Co. v. United States*, 11 Fed. Cir. (T) ____, ____ Slip Op. 93–1049 at 13 (June 22, 1993) (citation omitted). Pursuant to its broad discretion in this area, Commerce determined the best information available to be the absolute value of Toyo's reported SG&A expenses. The Court holds Commerce's choice of BIA was in accordance with law.

B. *Liquidated Sales:*

Pursuant to 19 U.S.C. § 1675(a)(2)(A) (1988), Commerce must determine "the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination * * *." In this case, the antidumping duty order provided as follows:

> The products covered by this investigation are certain internal-combustion, industrial forklift trucks, with lifting capacity of 2,000 to 15,000 lbs. * * *. The products covered by the investigation are further described as follows: Assembled, not assembled, and less than complete, finished and not finished, operator-riding forklift trucks powered by gasoline, propane, or diesel fuel internal-combustion engines of off-the-highway types used in factories, warehouses, or transportation terminals for short-distance transport, towing, or handling of articles.

Antidumping Order at 20,863. Commerce sought information concerning entries of products covered by the language of the order. Toyo failed to provide Commerce with the requested information regarding liquidated entries.

Toyo argues that because liquidated sales of the forklift trucks are not subject to the antidumping duty order and are not included within the final determination, Commerce cannot use such sales in calculating deposit rates. Commerce can only assess duties on unliquidated entries, but it can gather information on liquidated entries of the covered imports to accurately calculate the U.S. price of the merchandise under review and deposit rate for future entries. *See* 19 U.S.C. § 1675(a)(2). The

liquidated entries in question meet the listed physical criteria and were imported between the dates of the review period. Therefore, Commerce acted in accordance with law when it requested liquidated sales information from Toyo in order to calculate the U.S. price of the forklift trucks under review and deposit rates for future entries.

Although plaintiff argues that as a matter of law Commerce may not include liquidated entries in the calculation of deposit rates, plaintiff recognizes that it is a standard practice of Commerce to use liquidated entries where a margin based upon unliquidated entries would not be representative. Toyo, however, contends that Commerce's finding that Toyo's unliquidated sales "may be" unrepresentative was not based on substantial evidence because Toyo's unliquidated entries constituted 99% of its sales over the review period.

Plaintiff refused to submit its liquidated sales information. Thus, Commerce was not able to determine whether liquidated sales amounted to only 1% or whether these sales would have skewed the calculation of U.S. price. "It is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). This Court holds that Commerce properly requested information of plaintiff's liquidated sales of the subject merchandise, and that when plaintiff refused to provided this information, Commerce properly resorted to BIA *See* 19 U.S.C. § 1677e(c) (1988).

C. *Mark-ups:*

According to Toyo, Commerce should not have deducted certain trading company "mark-ups." Plaintiff paid its related trading companies a margin or mark-up on the amounts actually paid for the transportation services which the trading companies arranged. Toyo maintains Commerce should treat the mark-ups as an indirect selling expense because the payments are intra-company transfers of funds.

Pursuant to 19 U.S.C. § 1677a(d)(2)(A) (1988), Commerce must adjust the purchase price and the exporter's sales price by reducing,

> except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States * * *.

Commerce found the services performed by CIM and TAM's trading companies to be directly connected with the movement of forklift trucks from Japan to the United States. Commerce therefore determined Toyo's mark-ups are actual expenses relating to the movement of the subject imports that Toyo would have incurred regardless of the relationship of the party performing the service. Commerce's conclusions with respect to trading company mark-ups are reasonable and its determination of this issue is in accordance with law.

Toyo also argues Commerce's treatment of the mark-ups is contrary to its past practice and cites two determinations in support of its argu-

ment. First, Toyo cites *Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker from Japan,* 56 Fed. Reg. 12,156 (1991) (*Gray Portland Cement from Japan*). Toyo Brief at 31. The language pointed to by plaintiff, is part of a five step analysis based on the particular facts of *Gray Portland Cement from Japan* in which Commerce determined the sales in question were exporters' sales price sales. *Id.*, 56 Fed. Reg. at 12,164. The quote plaintiff uses to demonstrate an established practice of Commerce is based on a fact-specific analysis taken from a discussion of a question not at issue in the instant case.

The second determination cited by Toyo is *Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 29,244 (1990) (*Gray Portland Cement from Mexico*). Toyo Brief at 32 n. 6. In this determination, Commerce did not deduct a related party commission which it considered to be an intra-corporate transfer. *Gray Portland Cement from Mexico,* 55 Fed. Reg. at 29,251. Additionally, Commerce did not make an allowance for commissions paid to related parties. *Id.* Neither of these situations is applicable to the case at hand. After verifying the expenses at issue, Commerce determined they were not related to sales or any other activity which would serve as a basis for a commission. Furthermore, Commerce found that the trading companies are directly related to CIM and TAM, and are only indirectly related to Toyo. *See* 19 U.S.C. § 1677(13)(D) (1988). Therefore, the mark-ups are not intra-company transfers. The Court finds no merit in plaintiff's argument and holds plaintiff has failed to demonstrate a standard of practice from which Commerce has deviated.

D. *Currency Conversion:*

Toyo argues Commerce's failure to convert plaintiff's containerization expense from Japanese yen to U.S. dollars is not supported by substantial evidence on the record. However, plaintiff fails to identify anything on the record in support of its position. Plaintiff ailed to submit updated computer formatting instructions that would have produced yen-denominated amounts rather than dollar-denominated amounts. As a result it appeared that the reported expenses were still listed in dollars and Commerce will not convert dollar-denominated amounts. There was no reason for Commerce to believe that, despite the decimal point set to two places, these amounts were actually denominated in yen. "[T]his Court has recognized that '[p]laintiffs must prepare their own data accurately. They cannot expect Commerce to be a surrogate to guarantee all of their submissions are correct.'" *Murata Mf. Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–53 at 6 (April 20, 1993) (citation omitted). This Court holds Commerce properly did not convert the amounts to yen. Although plaintiff may find the result in this case to be harsh, plaintiffs must submit accurate data. "[W]ere the rule otherwise, some plaintiffs might endeavor to disrupt administrative proceedings by improperly seeking to manipulate data to secure Machiavellian style ends." *Id.*, Slip-Op. 93–53 at 12.

CONCLUSION

After considering all of plaintiff's arguments, the Court holds (1) the SG&A expenses incurred by Toyo in connection with the replacement of forklift masts should be subtracted from the U.S. price and Commerce properly used as BIA the absolute value of the negative SG&A expenses reported by Toyo; (2) Toyo's liquidated forklift truck entries were subject to review; (3) the trading company mark-ups that plaintiff disputes were actually movement expenses; and (4) Commerce is not required to correct Toyo's failure to report its containerization expenses in yen. Commerce's determination with respect to these issues is based on substantial evidence on the record and is otherwise in accordance with law.

SCHEDULE OF CONSOLIDATED CASES

Toyo Umpanki Co., Ltd. v. United States, Court No. 92–03–00135.

(Slip Op. 93–155)

OUTOKUMPU COPPER ROLLED PRODUCTS AB AND OUTOKUMPU COPPER (USA) INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND HUSSEY COPPER, LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–02–00108

[Plaintiffs' motions for judgment on the agency record and for remand granted; Defendant-Intervenors motion for judgment on the agency record granted in part, denied in part, and motion for remand granted. Remanded to the United States Department of Commerce.]

(Dated August 12, 1993)

Winthrop, Stimson, Putnam & Roberts, (Thomas V. Vakerics, Mark A. Monborne, and *David S. Christy, Jr.),* for plaintiffs Outokumpu Copper Rolled Products AB and Outokumpu Copper (USA) Inc.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer* and *Marc E. Montalbine), Linda S. Chang,* Of Counsel, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendants.

Collier, Shannon, Rill & Scott, (David A. Hartquist, Jeffrey S. Beckington, Kathleen Weaver Cannon, and Mary T. Staley), for defendant-intervenors.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This action comes before the court on plaintiffs' and defendant-intervenors' motions for judgment upon the agency record and for remand. The parties challenge the final results of the second and third administrative reviews by the United States Department of Commerce, International Trade Administration ("Commerce"), issued jointly in *Brass Sheet and Strip from Sweden,* 57 Fed. Reg. 2706 (Dep't Comm. 1992) (final admin. reviews). The court sustains Commerce's determination in part. The court also finds that Commerce's determination, in part, was not based upon substantial evidence or in

accordance with law, and grants those relevant portions of plaintiffs' and defendant-intervenors' motions for judgment upon the agency record and requests for remand.

Background

On March 10, 1986, certain defendant-intervenors in this action[1] and others filed an antidumping duty petition with Commerce alleging sales of brass sheet and strip from Sweden at less than fair value. On January 9, 1987, Commerce issued its final determination of sales at less than fair value regarding brass sheet and strip from Sweden, and found a dumping margin of 9.49 percent by plaintiff Outokumpu Copper Rolled Products AB ("Outokumpu AB")[2]. *See Brass Sheet and Strip from Sweden,* 52 Fed. Reg. 819 (Dep't Comm. 1987) (final determination). On March 6, 1987, Commerce entered its antidumping duty order. *See Brass Sheet and Strip from Sweden,* 52 Fed. Reg. 6998 (Dep't Comm. 1987) (antidumping duty order).

Commerce next issued the final results of its first administrative review of the antidumping order, which encompassed the period of August 22, 1986 through February 29, 1988. *See Brass Sheet and Strip from Sweden,* 55 Fed. Reg. 49,317 (1990), as amended 56 Fed. Reg. 21,178 (1991). Subsequently, on March 1, 1989 and March 30, 1990, Outokumpu AB requested that Commerce conduct administrative reviews for the periods of March 1, 1988 through February 28, 1989, and from March 1, 1989 through February 28, 1990. Commerce's final results of these second and third reviews are the subject of this consolidated action.

After initiation of the second and third reviews, Commerce forwarded questionnaires to Outokumpu AB concerning numerous issues raised in both the second and third administrative reviews. Plaintiffs submitted responses in July, 1989 and July, 1990. Commerce then forwarded to plaintiffs numerous supplemental questionnaires and requests for information seeking additional information, to which plaintiffs provided several responses.

Commerce next published a joint preliminary determination in both the second and third administrative reviews on June 28, 1991. *See Brass Sheet and Strip from Sweden,* 56 Fed. Reg. 29619 (Dep't Comm. 1991) (prelim. admin. reviews). Subsequently, a joint public hearing was conducted by Commerce regarding both reviews on August 12, 1991. All parties filed pre-hearing briefs.

Commerce then issued its joint final results of the second and third reviews in *Brass Sheet and Strip from Sweden,* 57 Fed. Reg. 2706

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[1] Defendant-intervenors in this action, Hussey Copper, Ltd., the Miller Company, Olin Corporation-Brass Group, Revere Copper Products, Inc., International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of American, Mechanics Educational Society of America (Local 56), and United Steelworkers of America, are either domestic manufacturers of brass sheet and strip, or are domestic unions representing workers who manufacture similar domestic merchandise.

[2] At the time of the original investigation, Outokumpu AB was known as Metallverken AB.
The second plaintiff in this action is Outokumpu Copper (USA) Inc. ("Outokumpu USA"). Outokumpu AB and Outokumpu USA are related parties because both are wholly-owned subsidiaries of Outokumpu Copper Oy.

(Dep't Comm. 1992) (final admin. reviews). In it, Commerce found that in certain sales of the subject merchandise, plaintiff Outokumpu AB sold merchandise directly to unrelated United States purchasers. In other closed consignment sales to unrelated United States purchasers, Outokumpu USA acted as the importer of record and selling agent in the United States for Outokumpu AB. Further, during the period of investigation, Outokumpu USA also received commission-like payments from Outokumpu AB, which Commerce classified as indirect selling expenses.

Commerce additionally found that while Outokumpu USA posted cash deposits in the amount of antidumping duties for United States sales of the merchandise, Outokumpu AB did not absorb any duties on behalf of an importer. Commerce also determined that in some transactions, Outokumpu AB paid freight charges for transportation of the merchandise from Sweden to the first United States destination. In other sales, Outokumpu AB paid freight costs for transportation from Sweden to a warehouse and on to the unrelated United States purchaser.

Finally, in calculating United States price for sales of the merchandise, Commerce utilized purchase price for certain sales while using exporter sales price for others.

Plaintiffs then filed two complaints with this court, the first challenging the second administrative results in *Outokumpu Copper Rolled Products AB v. United States of America,* Court No. 92–02–00108, and the other challenging the third review in *Outokumpu Copper Rolled Products AB v. United States of America,* Court No. 92–02–00109. Defendant-intervenors' motions to intervene as defendants in these cases were granted. Defendant-intervenors also objected to several aspects of the administrative reviews results, and filed with this court *Hussey Copper Ltd. v. United States,* Court No. 92–02–00110 concerning the second review, and *Hussey Copper Ltd. v. United States,* Court No. 92–02–00111 regarding the third review. Plaintiffs' motions to intervene as defendants in these actions were also granted. The court consolidated the actions under *Outokumpu Copper Rolled Products AB v. United States of America,* Consolidated Court No. 92–02–00108, on June 12, 1992.

Plaintiffs challenge only one aspect of Commerce's determination. They object to Commerce's reduction in the United States price for freight charges allegedly absorbed by Outokumpu AB, and its use of BIA to determine the amount of these freight costs.

Defendant-intervenors object to several aspects of Commerce's final results for its second and third reviews. First, they assert that Commerce failed to use best information available ("BIA") when calculating foreign market value. Defendant-intervenors also claim that Commerce incorrectly matched United States sales with foreign market sales, and that Commerce should have classified certain consignment sales as exporter's sales price rather than as purchase price transactions when cal-

culating United States price. Defendant-intervenors additionally object to Commerce's determination that commissions paid by Outokumpu AB to Outokumpu USA were indirect selling expenses. Further, defendant-intervenors argue that Commerce incorrectly failed to reduce United States price in the amount of the antidumping duties which Outokumpu AB "absorbed or reimbursed" for its unrelated customers in the United States.

Finally, defendant-intervenors assert that Commerce made several computer programming errors that require correction. With limited exceptions, plaintiffs and defendants agree with defendant-intervenors in this regard. As a result, the court remands the action to Commerce for correction of all but one of these errors, and defendant-intervenors withdraw their challenge to the remaining aspect of Commerce's computer program concerning home market sales in the data base for the third review period.

Discussion

A. *Standard of Review:*

An antidumping determination will be overturned only if it is not supported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. 1516a(b)(1)(B) (1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *N.A.R., S.p.A. v. United States,* 14 CIT 409, 412, 741 F. Supp. 936 (1990) (quoting *Gold Star Co. v. United States,* 12 CIT 707, 708–709, 692 F. Supp. 1382 (1988) *aff'd sub nom. Samsung Elecs. Co. v. United States,* 7 Fed. Cir. (T) 91, 873 F.2d 1427 (1989)).

Commerce is given "considerable deference in its interpretation of its statutory authority and the methodology employed in the administration of the antidumping law." *Tehnoimportexport v. United States,* 15 CIT 250, 253, 766 F. Supp. 1169 (1991) (citations omitted). Commerce's determination will not be overturned merely because the plaintiff can produce evidence in support of its own contentions and in opposition to the evidence supporting the agency's determination. *Id.*

B. *Adjustments for Difference-in-Merchandise:*

The court will address defendant-intervenors' objections first. Defendant-intervenors argue first that Commerce failed to use BIA when calculating an aspect of foreign market value.

Title 19 United States Code, Section 1677b(a)(1)(A) (1988) provides that foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States, at which such or similar merchandise is sold for home consumption. "Such or similar" merchandise is defined in 19 U.S.C. § 1677(16) (1988) as:

> * * * merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchan dise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

Title 19 United States Code, Section 1677b(a)(4) mandates that:

> In determining foreign market value, if it is established to the satisfaction of [Commerce] that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> * * * * * * *
>
> (C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,
>
> *then due allowance shall be made therefor.*

19 U.S.C. § 1677b(a)(4) (1988) (emphasis added).

The parties agree on the underlying facts in the instant action. In connection with the 1988–1989 and 1989–1990 administrative reviews, Commerce forwarded Questionnaires to plaintiffs which noted that:

> *Adjustments for Similar Merchandise.* If in your home market you do not sell merchandise that is identical in physical characteristics and use to that sold in the United States, identify the most similar types of merchandise that you sell domestically. * * * Identify all physical differences between the U.S. items and the most similar home market items selected for comparison and include any technical or other specifications used to identify the product. Indicate the cost difference attributable to each physical difference. *You should be aware that if we do not agree with you preference for comparison, at a later date we will have to request information on cost differences for the items we select for comparison,*

Antidumping Questionnaire at B-4, 1988–1989 Public Reel at 37, 1989–1990 Public Reel at 24 (emphasis added).

In response, plaintiffs proposed several model matches between merchandise sold in the United States and in the home market. Plaintiffs included difference-in-merchandise data for their proposed compari-

sons only. (*See* Questionnaire Response of plaintiffs at 11–18, 1988–1989 Confidential Reel at 20–27; Questionnaire Response of plaintiffs at 18–19, 1989–1990 Confidential Reel at 28–29.)

Commerce eventually used product comparisons different from those submitted by plaintiffs. Although Commerce used different product matches, Commerce never requested further information "on cost differences for the items [it] selec[ted] for comparison." Antidumping Questionnaire at B-4. Commerce just utilized the scarce difference-in-merchandise data available in plaintiffs' proposals that it could apply to the product comparisons it chose. Commerce simply noted in an internal memoranda that "[a]djustments were [only] made for physical differences where adequate data were provided." Final Results Memorandum to File at 2, 1988–1989 Public Reel at 871–2, 1989–1990 Public Reel at 808–809. Consequently, due to this lack of information, Commerce could not and did not make comprehensive difference-in-merchandise adjustments on the actual comparisons used.

Defendant-intervenors now contend that plaintiffs improperly failed to submit to Commerce adjustment data for the alternative model matches which Commerce chose. Defendant-intervenors argue plaintiffs should have known that Commerce would actually use these matches because they were utilized in the original investigation. Moreover, they contend that in the original investigation, plaintiffs similarly failed to provide difference-in-merchandise information and Commerce relied upon BIA. Here, they assert, because Commerce was without sufficient difference-in-merchandise information regarding the comparisons actually used, it should have relied upon BIA for this information, rather than forgoing all difference-in-merchandise adjustments that could not be made from the information plaintiffs originally submitted.

It is long settled that Commerce may use BIA only where "a party or any other person *refuses or is unable to produce information requested* in a timely manner and in the form required, or otherwise significantly impedes an investigation * * *." 19 U.S.C. § 1677e(c) (1988) (emphasis added). Commerce's own regulations provide that it may use BIA when Commerce "[d]oes not receive a complete, accurate, and timely response to [its] request for factual information * * *." 19 C.F.R. § 355.37(a)(1) (1992).

Moreover, case law has affirmed that:

> [a]lthough [Commerce] may properly request additional supplemental information, if needed, to fully resolve the issue, section 1677e(b) clearly requires *noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability. * * * To avoid the threat of § 1677e(b), a submitter need only provide complete answers to the questions presented in an information request.

Olympic Adhesives, Inc. v. United States, 8 Fed. Cir. (T) 69, 79, 899 F.2d 1565 (1990) (citation omitted). *See also Daewoo Elecs. Co. v. United States,* 13 CIT 253, 266, 712 F. Supp. 931 (1989).

In the case at bar, it is uncontested that Commerce never requested difference-in-merchandise information concerning product matches Commerce eventually used. Because this information was not sought, plaintiffs neither refused nor were they unable to produce information requested in a timely manner and in the form required. In addition, plaintiffs did not otherwise significantly impede the investigation. *See* 19 U.S.C. § 1677e(c) (1988).

Defendant-intervenors' theory is also unpersuasive that nevertheless, BIA was appropriate because plaintiffs, apparently on their own initiative, should have submitted additional difference-in-merchandise information in the administrative reviews since they were "already on notice from the original investigation as to the product comparisons the agency would use and the likely result if relevant cost adjustment data were not provided." Defendant-intervenors' Memorandum of Points and Authorities in Support of Motion for Judgment upon the Agency Record ("Defendant-intervenors' Memorandum") at 15 n. 3. well established that antidumping investigations and administrative reviews are wholly independent proceedings. *NSK Ltd. v. United States,* 16 CIT ____, 788 F. Supp. 1228, 1229 (1992). In the action at issue, Commerce's previous investigation did not create an abiding responsibility on plaintiffs to provide unrequested information in the administrative reviews.

Consequently, Commerce's determination not to rely upon BIA for difference-in-merchandise information was proper and in accordance with law, and this aspect of Commerce's final results is affirmed.

C. *Most Similar Home Market Sales:*

Defendant-intervenors' next argument is also based upon 19 U.S.C. § 1677b(a)(1)(A) (1988) which, as noted under Section B above, provides that foreign market value of imported merchandise shall be the price at which "such or similar merchandise" is sold in the home market.

Defendant-intervenors assert that Commerce did not choose the "most" similar home market sales pursuant to 19 U.S.C. § 1677(b)(a)(1)(A) (1988) when matching United States sales with foreign market sales. Specifically, defendant-intervenors argue that Commerce must choose the "most" similar products for comparison. In this case, Commerce established a hierarchy of model matching criteria based upon four general physical characteristics of the merchandise – class or form, alloy, gauge, and width. Where exact matches of merchandise on each of these four criteria or groupings were not available, Commerce eliminated criteria in reverse order of importance, i.e. width then gauge.

Defendant-intervenors claim that instead of eliminating the entire grouping altogether, Commerce should have compared products with the next most similar characteristics within each criteria. For example, if products with an identical width could not be found, Commerce should have compared articles with the next most similar widths, and not merely ignored the width criterion altogether. Defendant-intervenors' Memorandum at 19.

"An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of [foreign market value] calculations." *NTN Bearing Corp. v. United States,* 14 CIT 623, 633, 747 F. Supp. 726 (1990), citing *Timken Co. v. United States,* 10 CIT 86, 96, 630 F. Supp. 1327 (1986). However, the *NTN Bearing Corp. of America* court also noted that:

> Commerce has traditionally been granted broad discretion in the selection of methodology implemented to achieve its mandate. Hence, absent a showing of unreasonableness on the part of the agency, its choice of methodology shall be sustained. Moreover, it is [Commerce] rather than an interested party that should make the determination as to what methodology should be used.

NTN Bearing Corp. of America v. United States, 14 CIT at 633 (citations omitted).

The question before the court, therefore, is whether Commerce's elimination of certain matching criteria where comparison models were not identical was reasonable and supported by substantial evidence. In its final results, Commerce supported its determination with the simple statement that:

> The model match method the Department used for these reviews is consistent with the one used for the original investigation and for the first review. Neither respondent nor petitioners raised any objection to the model match until after the Department issued its preliminary results. Additionally, petitioners have not provided any compelling reasons why the Department should now change its model match method for these reviews.

Brass Sheet and Strip from Sweden, 57 Fed. Reg. at 2708.

It is long settled law that a court may uphold a determination by Commerce "of less than ideal clarity if the agency's path may be reasonably discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974). However, the determination must still "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 197 (1941)). An agency "must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc.* at 168. Further, the agency must articulate a rational connection between the facts found and the choice made. *Id.*

In the case at bar, Commerce failed to provide sufficient justification for its decision to eliminate matching criteria altogether where exact matches of merchandise on all groupings were not available. Due to the brevity of Commerce's explanation, the court cannot ascertain the reasons supporting Commerce's decision to exclude groupings, and whether those grounds were reasonable. For example, the court is pre-

vented from evaluating whether Commerce appropriately excluded other methodologies because of their complexity or unmanageability.

Therefore, the court remands the determination to Commerce with instructions upon remand to provide an explanation of its decision to eliminate model matching criteria where exact matches were unavailable, as well as its determination not to utilize defendant-intervenors' proposed methodology of retaining each criteria and comparing products with the next most similar characteristics within each grouping if an exact match is unavailable.

D. *Use of Purchase Price as United States Price:*

In their next challenge, defendant-intervenors assert that when calculating United States price, Commerce should have classified certain consignment sales as exporter's sales price, rather than as purchase price, transactions. Title 19 United States Code, Section 1677a (1988) defines United States price as either the purchase price or exporter's sales price of the merchandise at issue. Purchase price is specifically described under 19 U.S.C. 1677a(b) (1988) as:

> the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.

Alternatively, 19 U.S.C. 1677a(c) (1988) defines exporter sales price as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *."

Commerce has a longstanding practice of using purchase price as the United States price when domestic sales of the merchandise in question were made through related United States selling agents providing three qualifications are met. *See e.g. Steel Wheels from Brazil,* 54 Fed. Reg. 21456 (Dep't Comm. 1989) (final determination); *Polyethylene Terephthalate Film, Sheet and Strip from Japan,* 56 Fed. Reg. 16300 (Dep't Comm. 1991) (final determination); *Borusan Holding A.S. v. United States,* No. 92–57 (CIT Apr. 23, 1992).

In these actions, the manufacturer must ship the merchandise directly to the unrelated buyer, without introducing it into the related selling agent's inventory. This procedure must be the customary sales channel between the parties. The related selling agent located in the United States must act only as a processor of documentation and a communications link with the unrelated buyer.[3] If these three conditions are met, Commerce bases the purchase price on the price paid by the un-

[3] *See e.g. Polyethylene Terephthalate Film, Sheet, and Strip from Japan* 56 Fed. Reg. 16300, 16301 (Dep't Comm. 1991) (final determination) which provides:

1. The merchandise in question was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the physical inventory of the related selling agent;

2. This channel was the customary commercial channel for sales of this merchandise between the parties involved; and

3. The related selling agent located in the United States acted only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

related purchaser in the United States. *See e.g. Borusan Holding A.S. v. United States,* No. 92–57 (CIT Apr. 23, 1992).

Commerce determined that the transactions at bar involved closed-consignment sales made pursuant to a detailed, long-term contract between Outokumpu AB and a single unrelated purchaser in the United States. Outokumpu USA facilitated the sales from within the United States. Commerce found that Outokumpu AB shipped the merchandise directly to the unrelated buyer with no evidence that the products entered Outokumpu USA's inventory. Further, this pattern was Outokumpu AB's traditional commercial channel for these sales, and Outokumpu USA acted only as a processor of information Consequently, the sales were properly classified as purchase price transactions.

Defendant-intervenors challenge the sufficiency of the evidence supporting three aspects of Commerce's conclusions. Specifically, defendant-intervenors claim that Outokumpu AB did not ship the merchandise directly to an independent buyer. Instead, they argue that the evidence showed the products were first shipped to independent warehouses, whose costs were borne by Outokumpu USA. Secondly, they assert, that in all its transactions up until the second and third administrative reviews, Outokumpu AB transported its merchandise directly to a warehouse owned by Outokumpu AB. Therefore, the pattern of sales was not the customary commercial channel for Outokumpu AB's sales.

Finally, they claim, Outokumpu USA was not simply a processor of sales related information. It acted as the importer of record, paid estimated antidumping duties on the merchandise, retained title prior to sale to the unrelated third party, and received commissions for its role in the transactions.

The court notes from the outset that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). The court will affirm the determination of Commerce when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence. *Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 15S6 (1984).

The issue before the court, therefore, is whether Commerce properly determined that the consignment sales met each purchase price criteria. The evidence shows that a long-term contract existed between Outokumpu AB and the unrelated United States customer covering all of the transactions at issue. Pursuant to contract terms, the customer placed a "call off" with Outokumpu AB through Outokumpu USA for a specified amount of merchandise. Outokumpu AB manufactured the products and shipped them directly to the purchaser or an independent warehouse. Although Outokumpu USA accepted title to the merchan-

dise and paid some warehousing costs, warehoused merchandise was released upon the customer's request on a "just-in-time" basis.

The court notes that the evidence in this action closely parallels that in *Steel Wheels from Brazil,* 54 Fed. Reg. 21456 (Dep't Comm. 1989) (final determination), where Commerce used purchase price to calculate United States price. Commerce noted that the merchandise was purchased or agreed to be purchased prior to importation, the selling agent acted only as a processor of sales, the products sold were:

> made-to-order and not sold through inventory. Although a party related to the seller took title to the wheels and held them in its warehouse after the sale was made, this was only to accommodate the "just-in-time" delivery terms stipulated in the requirements contract negotiated between the Brazilian producer and the U.S. * * * purchaser. All terms of the sale were settled in this contract and were not changed by the related party when it released the wheels to the U.S. * * * purchaser.
>
> [And] [w]arehousing for "just-in-time" delivery was the customary channel of trade for wheels sold [to the U.S.] purchaser.

Id. at 21457. *See also Polyethylene Terephthalate Film, Sheet and Strip from Japan,* 56 Fed. Reg. 16300 (Dep't Comm. 1991) (final determination).

Similarly, in the case at bar, the evidence showed that Outokumpu USA performed only ministerial functions. It accepted title to the products and paid warehousing costs simply to accommodate the 'just-in-time' delivery terms stipulated in the contract. All terms of the sale were contractually settled, and remained unchanged by Outokumpu USA when it released the merchandise. Moreover, the existence of the contract confirms Commerce's finding that this procedure was Outokumpu AB's traditional commercial channel with this customer.

Further, the facts at bar differ significantly from those in *New Minivans from Japan,* 57 Fed. Reg. 21937 (Dep't Comm. 1992) (final determination), where Commerce relied upon exporter's sales price. In that action, Commerce based its determination upon "all of [the] circumstances," including evidence that the related United States selling agent was fully responsible for marketing the product. *Id.* at 21,945. The agent helped formulate marketing strategies with an advertising agency, and bore all advertising and marketing costs. While, as in the instant case, the agent in *New Minivans from Japan* took title to the merchandise, it also actively processed warranty claims.

Clearly, here, Outokumpu USA did not participate in sales and post sale activity to the extensive degree as did the selling agent in *New Minivans from Japan.* The court finds, therefore, that sufficient evidence supported Commerce's decision to use purchase price as the United States price in the transactions at bar. Commerce's final results are affirmed in this regard.

E. *Adjustment of U.S. Price for Indirect Selling Expenses:*

In Commerce's calculation of United States price, defendant-intervenors object to Commerce's determination that commissions paid by Outokumpu AB to Outokumpu USA, its related sales agent in the United States, were indirect selling expenses. Defendant-intervenors assert that not only did Commerce fail to place the burden upon plaintiffs of showing that these expenses were indirect, but plaintiffs did not demonstrate that the expenses were in fact indirect.

The facts regarding this issue are complex. For certain United States sales, Outokumpu AB incurred expenses, similar to commissions, which were paid to Outokumpu USA in the United States. In its preliminary determination of United States price, Commerce expressly stated it made deductions for commissions when calculating exporter's sales prices only. *Brass Sheet and Strip from Sweden,* 56 Fed. Reg. 29619 (Dep't Comm. 1991) (prelim. admin. reviews). In connection with its calculation of foreign market value, Commerce stated that:

> [s]ince there were no commissions paid in the home market during the March 1, 1988 through February 28, 1989 period, for purchase price transactions, we deducted home-market indirect selling expenses from [foreign market value] to offset U.S. commissions. *See* 19 CFR 353.56(b)(1).
>
> No indirect selling expenses were provided for the period March 1, 1989 through February 28, 1990 for both purchase price and exporter's sales price transactions. For purchase price transactions, we added the U.S. commissions to [foreign market value] and did not offset [foreign market value] for these indirect expenses. *See* 19 CFR 353.56(b)(1); *See* 19 CFR 353.56(b)(2).

Brass Sheet and Strip from Sweden, 56 Fed. Reg. 29619 (Dep't Comm. 1991) (prelim. admin. reviews).

Subsequently, plaintiffs filed their pre-hearing brief in which they objected to Commerce's decision to adjust United States price for commissions paid to Outokumpu USA by Outokumpu AB. Plaintiffs argued that adjustment was improper because the commissions were merely intracorporate transfers, and not directly related, arm's length transactions.

In Comment One of Commerce's final results, Commerce addressed plaintiffs' challenge to its preliminary decision to adjust for commissions paid to Outokumpu USA. Commerce explained that:

> [t]he Court of Appeals remand in *LMI-La Metalli Industriale S.p.A. v. United States,* 912 F.2d 455 (1990), instructed the Department to adjust for commissions paid to a related party in the home market when the commissions were determined to be (1) at arm's length and (2) directly related to the sales in question. Subsequent to this, the Department has developed the following guidelines to determine whether commissions paid to related parties either in the United States or in the foreign market are at arm's length * * *.

Brass Sheet and Strip from Sweden, 57 Fed. Reg. at 2707.

Commerce then specified that it compared similarities and differences between commissions paid to related selling agents with those paid to unrelated selling agents, or where no unrelated sales agent existed, it compared commissions to those paid to related sales agents on sales of merchandise produced by other unrelated entities to determine if they were at arms length. *Id.* at 2707. Commerce continued that "[i]f, based on the above analysis, the Department is satisfied that the commissions are at arm's length as well as directly related to the sales, we will make an adjustment for these commissions." *Id.* at 2707. Commerce next found that while evidence showed that the commissions in this directly related to the sales, sufficient evidence was not presented to demonstrate the arm's length nature of the commissions. Commerce concluded that therefore no direct commission adjustments were appropriate. However, where commission expenses were not at arm's length, Commerce treated "such payments to related parties as indirect selling expenses," and deducted these costs from exporter's sales price calculations *Id.* at 2707.

It is this decision to treat these costs as indirect selling expenses which defendant-intervenors challenge. Specifically, defendant-intervenors argue that should Commerce have found the commission expenses were both directly related and arms length costs, the resulting adjustment would increase plaintiffs' dumping margin.

Alternatively, defendant-intervenors contend, if the commissions were found not to meet both of these tests, the expenses would not be considered direct selling expenses. Rather, they are treated, as they were in this case, as indirect selling expenses. In cases of this nature, Commerce *only* deducts these amounts from *exporter's sales price* calculations, and *not* from *purchase price* determinations. Since the majority of plaintiffs' sales at issue were treated by Commerce as purchase price transactions, the United States price for most of plaintiffs' sales would not be reduced, and the dumping margin would not be increased. Defendant-intervenors argue that, therefore, plaintiffs' served if the commissions incurred in the United States are treated as indirect selling expenses.

Defendant-intervenors conclude that Commerce labeled the commissions indirect selling expenses by default simply because plaintiffs failed to prove they were direct arm's length commission expenses—a showing against their interests. Accordingly, Commerce failed to place the burden on plaintiffs of showing that the expenses were indirect.

The court must therefore determine whether Commerce improperly freed plaintiffs from their burden of proof, and whether sufficient evidence supported Commerce's determination that the expenses were indirect. In order to accomplish these tasks, the court must identify the precise adjustments for commission expenses which Commerce made to United States price and foreign market value, and the statutory provisions supporting that treatment. After an exhaustive review of the record, the court cannot ascertain the exact adjustments for commissions

which Commerce made in the preliminary review results to exporter's sales price, purchase price, and foreign market value calculations. The court also cannot identify the statutory or regulatory provisions relied upon by Commerce in its preliminary review results. Likewise, in regard to Commerce's final review results, the court is unable to conclusively determine the precise provisions supporting Commerce's finding that the payments were indirect expenses properly deducted from exporter's sales price calculations.

Because the court cannot discern from the record the facts supporting Commerce's adjustments, the court is unable to make a determination on this issue at this time. The court remands this portion of Commerce's final review results to Commerce. Upon remand, Commerce is directed to explicitly identify, for both the preliminary and final review results, all adjustments for commission-related expenses made to United States price and foreign market value, as well as the specific supporting statutory and regulatory provisions.

F. *Reimbursement of Antidumping Duties:*

Defendant-intervenors next assert that Commerce incorrectly failed to reduce United States price in the amount of the antidumping duties which Outokumpu AB "absorbed or reimbursed" for certain sales to its unrelated customers in the United States. Defendant-intervenors Memorandum at 40.

The relevant Code of Federal Regulations directives provide as follows:

> **§ 353.26 Reimbursement of antidumping duties.**
>
> (a) *In general.* (1) In calculating the United States price, the Secretary will deduct the amount of any antidumping duty which the producer or reseller:
>
> (i) Paid directly on behalf of the importer; or
>
> (ii) Reimbursed to the importer.

19 C.F.R. § 353.26 (1992).

> **§ 353.2 Definitions**
>
> (i) *Importer. Importer* means the person by whom, or for whose account, the merchandise is imported.
>
> * * * * * * *
>
> (r) *Producer; production. Producer* means a manufacturer or producer. *Production* means manufacture or production.
>
> (s) *Reseller. Reseller* means any person (other than the producer) whose sales the Secretary uses to calculate foreign market value or U.S. price, including the foreign reseller or exporter.

19 C.F.R. § 353.2 (1992).

The record shows that Outokumpu USA was the importer of record for the merchandise at issue which was produced by Outokumpu AB. Upon entry into the United States, Outokumpu USA complied with its statutory obligation and posted cash deposits in the amount of estimated antidumping duties.

As they did in the proceedings below, defendant-intervenors now argue that the fundamental precept of antidumping duty law is to raise the importer's purchase price to an amount equal to the foreign producer's home price. However, where the foreign producer, rather than the true United States importer, pays the duty, the economic pressure on the importer is lifted, and the importer can sell the imports in the United States at a price uninfluenced by the duty. Defendant-intervenors Memorandum at 45.

Defendant-intervenors concede that Outokumpu USA posted cash deposits on all subject imports. However, defendant-intervenors argue that these deposits were payment of *duties,* and financial statements show that these duties were reflected on Outokumpu AB's annual report, which is a consolidated statement that includes Outokumpu USA's expenses as Outokumpu AB's expenses. Accordingly, they claim, the court should treat Outokumpu AB and Outokumpu USA as a single entity, and conclude that "payment of antidumping duties by [Outokumpu] USA is tantamount to payment by [Outokumpu] AB and hence adjustable reimbursement." Defendant-intervenors' Memorandum at 49.

Defendant-intervenors hold that, moreover, other evidence supports their reasoning. For example, in regard to purchase price sales, Outokumpu AB and Outokumpu USA should be collapsed together because, as discussed previously in Section D of this opinion, Commerce considered them a single company for those sales and used Outokumpu USA's price to the first unrelated purchaser as the United States price. Further, as discussed previously in Section E of this opinion, Commerce determined that both companies were in reality a single entity because commissions paid to Outokumpu USA were treated not as arm's length transactions, but as "intracompany" transfers. In order to remain consistent, Commerce must here again view Outokumpu AB and Outokumpu USA as a single unit.

With respect to exporter's sale price sales, defendant-intervenors also contend that evidence shows Outokumpu AB and Outokumpu USA should be collapsed. Defendant-intervenors assert that Outokumpu USA qualified as a reseller (pursuant to 19 C.F.R. § 353.2 (1992) and 19 C.F.R. § 353.26 (1992)), and the unrelated United States purchasers should be considered the "importers-in-fact." Since Outokumpu USA, as a reseller, paid antidumping duties directly for these "importers-in-fact," the United States price should correspondingly be adjusted.

Commerce's views on defendant-intervenors' contentions are clear. In Comment Eight of its final results, Commerce examined, then rejected defendant-intervenors argument, and stated that the regulations hold that:

> in calculating the U.S. price, the Department will deduct any amount of antidumping duties that are reimbursed to the importer by the producer or reseller. There is no evidence on the record that [Outokumpu] AB pays any antidumping duties directly for

> [Outokumpu] USA or reimburses [Outokumpu] USA for such duties. Absent evidence of reimbursement, the Department has no authority to make such an adjustment to U.S. price.

Brass Sheet and Strip from Sweden, 57 Fed. Reg. at 2708.

The court finds that Commerce acted well within its discretion in rejecting defendant-intervenors' arguments. As an initial matter, the court emphasizes that 19 C.F.R. § 353.26 (1992) permits adjustment to United States price *only* where the producer or reseller *paid duties on behalf of the importer* or *reimbursed the importer*. Not only do defendant-intervenors not claim that Outokumpu AB paid duties on behalf of Outokumpu USA or reimbursed Outokumpu USA, but the court can find no evidence on the record suggesting that Outokumpu AB did.

Instead, defendant-intervenors' position is based solely on the extraordinary theory that the court should overlook past administrative practice, determine that Outokumpu AB and Outokumpu USA are properly collapsed together, that ultimate United States purchasers are actually importers, and conclude that Outokumpu AB/Outokumpu USA reimbursed or paid duties directly on behalf of "importers-in-fact."

Most importantly, the court notes again that Commerce is given considerable deference in interpreting its statutory authority, and in the choice of methodology it utilizes. *Tehnoimportexport v. United States,* 15 CIT 250, 253, 766 F. Supp. 1169 (1991) (citations omitted).

Further, Commerce previously discarded defendant-intervenors' precise contentions in *Brass Sheet and Strip from the Republic of Korea,* 54 Fed. Reg. 33,257 (Dep't Comm. 1989) (final admin. review). In that action, petitioners had argued that Commerce should deduct from the United States price the amount of the antidumping duties to be paid by the respondent's United States affiliate who was the importer of record, because it will "achieve the price equilibrium intended by" the regulations. *Id.* at 33257. Commerce did not collapse the respondent and its United States affiliate. Instead, it treated them as separate entities, and found that it had no authority to make such an adjustment because petitioners had "not alleged that antidumping duties are being reimbursed [to the United States affiliate], and there is no evidence on the record that an agreement to reimburse those duties exists." *Id.*

Here, defendant-intervenors are unable to distinguish the present case from *Brass Sheet and Strip from the Republic of Korea* by demonstrating, for example, that Outokumpu AB's and Outokumpu USA's identities were so intermingled so as to necessitate treatment as a single entity. Defendant-intervenors could only point to the slender reed of evidence that Outokumpu USA's expenses were listed under Outokumpu AB's on a corporate report. However, not only did uncontested evidence establish that Outokumpu AB and Outokumpu USA were distinct, wholly-owned subsidiaries of Outokumpu Copper Oy, no evidence affirmatively demonstrated any improper financial intermingling between the companies.

Likewise, defendant-intervenors' citations to joint sales activity which supported Commerce's use of purchase price for United States price, or to the commission-like transfers of funds between Outokumpu AB and Outokumpu USA were also insufficient to require the court to view them as one entity. Neither Outokumpu USA's actions in *certain sales* as a document processor or communications link with Outokumpu AB nor Outokumpu USA's receipt of non-arm's length commission-like payments reveal any improper disregard of Outokumpu AB and Outokumpu USA's separate corporate identities or any inappropriate financial intermingling.

Moreover, even assuming Outokumpu AB and Outokumpu USA had intermingled identities, defendant-intervenors were unable to point to statutory or case law, or administrative practice which permits the court to transform the ultimate United States purchasers into importers[4], or which allows the court to recast cash deposits made by Outokumpu USA into duties actually paid. Similarly, defendant-intervenors cannot point to evidence showing that Outokumpu AB *OR* Outokumpu USA *reimbursed* any party, or paid duties *directly* on an importer's behalf.

The court determines, therefore, that Commerce properly refused to reduce United States price because neither Outokumpu AB nor Outokumpu USA paid duties on behalf of an importer, or reimbursed an importer for duties. Commerce's final results are accordingly sustained in this respect.

G. *Computer Programming Errors:*

All parties agree that a remand is appropriate in order that several computer programming errors made by Commerce may be corrected. Specifically, upon remand Commerce is instructed to fairly recalculate difference-in-merchandise adjustments to relate to contemporaneous sales, and to recalculate differences in metal values by subtracting the full metal value costs for one alloy from the full metal value costs for another. Additionally, Commerce is directed to make fabrication cost difference-in-merchandise adjustments using the relevant data provided by plaintiffs, and to make adjustments for differences-in-merchandise where cost adjustment information was supplied for the third administrative review period.

Finally, because defendant-intervenors withdraw their challenge to Commerce's inclusion of certain home market sales in the data base for the third review period, the court need not address this issue.

H. *Use of Best Information Available for Freight Charges:*

In their only challenge to the final results, plaintiffs assert that Commerce improperly reduced United States price in the amount of freight charges allegedly incurred by Outokumpu AB in transportation of the subject merchandise between independent United States warehouses and purchasers in the United States. Plaintiffs claim that Commerce in-

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[4] The court likewise was unable to locate such authority, and existing sources held to the contrary. *See A.N. Deringer, Inc. v. Consolidated Computer Serv. Int'l. Inc.* 381 F. Supp. 1208 (D. Mass 1974).

correctly determined that Outokumpu AB paid these freight charges, when in fact the unrelated United States purchasers did. Further, because Outokumpu AB did not pay these charges and, accordingly, no information existed regarding the amounts, Commerce erroneously relied upon BIA to determine the amount of the freight costs "paid" by Outokumpu AB.

Title 19 United States Code, Section 1677a(d)(2)(A) (1988) provides that United States price shall be reduced by:

> the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States * * *.

In order to ascertain the amount of freight charges incurred by plaintiffs, Commerce requested in questionnaires for both the second and third administrative reviews that Outokumpu AB list all relevant freight charges.

In response, plaintiffs noted that Outokumpu AB paid "freight and insurance on a point-to-point basis from Vasteras [Sweden] to the first U.S. destination."1989–1989 Confidential Reel at 44, 1989–1990 Confidential Reel at 49.

However, Commerce subsequently forwarded to plaintiffs requests seeking information, in part, on closed consignment sales. In its responses to the requests, Outokumpu AB delivered a copy of a closed consignment sales agreement to Commerce, which included a letter of agreement ("Letter") between Outokumpu AB and an unrelated United States purchaser. The Letter noted that Outokumpu AB will "absorb freight charges for one delivery to [the purchaser] per week at a minimum of [a specified amount of] pounds." 1988–1989 Confidential Reel at 480.

Commerce asserts that "[f]rom the terms of this agreement it appeared that [Outokumpu] AB was responsible for paying the freight not only for delivery to the independent warehouse but also for delivery to the customer's premises." Defendant's Memorandum in Partial Opposition to Plaintiffs' Motions for Judgment upon the Agency Record at 9. As a result, Commerce issued a supplemental questionnaire in the second administrative review which stated:

> 3. *Freight:*
>
> a. Please explain whether [Outokumpu] AB, [Outokumpu] USA, or the unrelated third party purchasers paid the freight expenses for transferring the merchandise from independent warehouses to the unrelated third party purchasers. (Refer, for example, to [the Letter].)
>
> b. Was any entity reimbursed for these warehousing expenses? If so, please explain.
>
> c. If yes, please provide these expenses on a sale-by-sale basis.

1988–1989 Public Reel at 580.

In the third review, Commerce's questionnaire stated only that:

> 4. *Freight*
>
> a. Please report whether [Outokumpu] AB, [Outokumpu] USA, or the unrelated third party purchasers paid the freight expenses for transferring the merchandise from independent warehouses to the unrelated third party purchasers.
>
> b. Was any entity reimbursed for these warehousing expenses? If so, please explain.
>
> c. If yes, please provide these expenses on a sale-by-sale basis.

1989–1990 Public Reel at 497.

Plaintiffs replied in response to Item 3a and Item 4a, respectively, of both questionnaires that "[t]he unrelated third party purchasers paid all freight expenses between the independent warehouses and their factories." 1988–1989 Confidential Reel at 1085; 1989–1990 Public Reel at 506. In reference to Items 3b, 3c, 4b and 4c, respectively, plaintiffs noted that "[n]o party was reimbursed for these expenses." 1988–1989 Confidential Reel at 1085; 1989–1990 Public Reel at 506.

Nevertheless, in its preliminary results, Commerce found that:

> [f]or the one U.S. customer for which we had information that [Outokumpu] AB's U.S. subsidiary paid some of the freight costs from independent U.S. warehouses to the customer, but for which we had received no information on these freight costs, we used the reported ocean freight expenses as the best information available (BIA).

Brass Sheet and Strip from Sweden, 56 Fed. Reg. at 29,619.

Subsequently, Commerce notified plaintiffs that its information that Outokumpu AB's United States subsidiary paid some of the freight costs was obtained from the Letter previously submitted by plaintiffs. 1988–1989 Confidential Reel at 1096. Plaintiffs then informed Commerce in their pre-hearing briefs and at the hearing itself that Outokumpu AB did not pay freight charges because the United States purchaser did not insist that it honor the provisions of the Letter.

On January 23, 1992, Commerce issued its final results in which it found that:

> [t]he Department has received conflicting information from [Outokumpu] AB concerning which party eventually paid the freight charges for movement between the independent U.S. warehouse and the U.S. purchaser's warehouse. As an appendix to its original questionnaire response, respondent submitted copies of a letter that stated that respondent paid certain of these freight charges. In a supplemental questionnaire, the Department asked about these charges and specifically drew respondent's attention to that letter. In its response to the supplemental questionnaire, [Outokumpu] AB stated that the U.S. customer paid the freight and was not reimbursed by any party. However, [Outokumpu] AB did not address the contradictory information in the letter that it had supplied to the Department, despite the Department's specific request to do so. Not until after the Department issued its preliminary re-

> sults did respondent address this specific issue. Therefore, the Department considers this additional information untimely, and deducted a freight charge from U.S. price, using for freight the BIA used in the preliminary results for these final results.

Brass Sheet and Strip from Sweden, 57 Fed. Reg. at 2707.

Plaintiffs now argue that Commerce's contention that it received conflicting information from Outokumpu AB concerning which party paid freight charges was erroneous. Plaintiffs claim they fully responded to the supplemental questionnaires, which were effectively yes or no inquiries. Further, Commerce did not expressly request a specific and narrow comment regarding the language in the Letter that Outokumpu AB would absorb freight charges. It simply asked plaintiffs to refer to the Letter, which plaintiffs did prior to preparing their response.

As previously discussed, BIA may be properly utilized only where a party refuses or is unable to timely produce information requested. 19 U.S.C. § 1677e(c) (1988). While Commerce is afforded wide discretion in the use of BIA, Commerce's discretion is not entirely unfettered. Courts have, for example, found Commerce's resort to BIA to be arbitrary and an abuse of discretion where the respondent failed to give information because the information did not and could not exist. *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) 69, 899 F.2d 1565 (1990). Commerce must also properly instruct the respondent as to the information requested. *See Daewoo Elecs. Co. v. United States,* 13 CIT 253, 266, 712 F. Supp. 931 (1989).

In the case at bar, Commerce's supplemental questionnaires simply sought an explanation of whether Outokumpu AB, Outokumpu USA, or unrelated purchasers paid freight expenses. Plaintiffs' reply that unrelated purchasers paid all freight expenses between independent warehouses and their factories was fully responsive to the inquiry. Plaintiffs' explanation explicitly informed Commerce that unrelated purchasers, to the exclusion of all other parties, paid all freight costs.

Commerce's argument in its final results is not convincing that its notation requesting plaintiffs to "[r]efer, for example" to the Letter was, in fact, an express instruction to plaintiffs to specifically explain the "conflicting" information on the record. Commerce's request only asked plaintiffs to refer *"for example"* to the Letter; it did not direct them to explicitly *discuss* the contents of the Letter.

Commerce's argument also inaccurately presumes that the "contradictory" evidence in the record was so obvious that the only reasonable purpose of the supplemental questionnaire was to resolve these "inconsistencies." However, the evidence in the record was neither contradictory nor obvious. The Letter only noted that Outokumpu AB "will" absorb freight charges; it did not definitively indicate that Outokumpu AB actually paid these costs. The fact that plaintiffs did not actually pay freight charges because payment was not demanded of them is manifestly not contradictory to a contract provision suggesting plaintiffs could be held liable for them. If Commerce desired an explanation of

why Outokumpu AB contracted to absorb certain freight charges, but did not actually pay them, it should have expressly requested one.

The court finds that plaintiffs neither refused nor were unable to produce information requested by Commerce regarding "inconsistent" evidence of payment for freight expenses. Therefore, Commerce improperly relied upon BIA for the amount of freight charges. Accordingly, Commerce's final results are remanded with instructions upon remand to recalculate United States price without reduction for these freight charges.

Conclusion

For the reasons provided above, this court holds that the final results of Commerce's second and third administrative reviews regarding sales of brass sheet and strip from Sweden were, in part, supported by substantial evidence and in accordance with law, and in part unsupported by substantial evidence and not in accordance with law. Accordingly, Commerce's final results are affirmed in part, the parties' motions for judgment on the agency record are denied in part, granted in part, and their motions for remand are also granted.

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's published order entered on August 9, 1993 is being published by the Clerk's Office as Slip Op. 93–156 on August 12, 1993.

(Slip Op. 93–156)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., ET AL., DEFENDANT-INTERVENORS

Court No. 91–07–00528

(Dated August 9, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendant's motion for entry of partial final judgment pursuant to Rule 54(b) and other pertinent papers, it is hereby

DECIDED that there is no just reason for delay in entry of final judgment as to paragraph 4(j) of plaintiff's complaint pursuant to Rule 54(b), and it is hereby

ORDERED that a final judgment is entered as to paragraph (4)(j) of plaintiff's complaint as decided by this Court in Slip Op. 93–88 (June 1, 1993).

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's published order entered on August 9, 1993 is being published by the Clerk's Office as Slip Op. 93–157 on August 12, 1993.

(Slip Op. 93–157)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., ET AL., DEFENDANT-INTERVENORS

Court No. 91–07–00529

(Dated August 9, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendant's motion for entry of partial final judgment pursuant to Rule 54(b) and other pertinent papers, it is hereby

DECIDED that there is no just reason for delay in entry of final judgment as to paragraph 4(j) of plaintiff's complaint pursuant to Rule 54(b), and it is hereby

ORDERED that a final judgment is entered as to paragraph 4(j) of plaintiff's complaint as decided by this Court in Slip Op. 93–90 (June 2, 1993).

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's published order entered on August 9, 1993 is being published by the Clerk's Office as Slip Op. 93–158 on August 12, 1993.

(Slip Op. 93–158)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., ET AL., DEFENDANT-INTERVENORS

Court No. 91–07–00531

(Dated August 9, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendant's motion for entry of partial final judgment pursuant to Rule 54(b) and other pertinent papers, it is hereby

DECIDED that there is no just reason for delay in entry of final judgment as to paragraph 4(j) of plaintiffs complaint pursuant to Rule 54(b), and it is hereby

ORDERED that a final judgment is entered as to paragraph 4(j) of plaintiff's complaint as decided by this Court in Slip Op. 93–94 (June 3, 1993).

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's published order entered on August 9, 1993 is being published by the Clerk's Office as Slip Op. 93–159 on August 12, 1993.

(Slip Op. 93–159)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., ET AL., DEFENDANT-INTERVENORS

Court No.–91–07–00532

(Dated August 9, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendant's motion for entry of partial final judgment pursuant to Rule 54(b) and other pertinent papers, it is hereby

DECIDED that there is no just reason for delay in entry of final judgment as to paragraph 4(j) of plaintiff's complaint pursuant to Rule 54(b), and it is hereby

ORDERED that a final judgment is entered as to paragraph 4(j) of plaintiff's complaint as decided by this Court in Slip Op. 93–95 (June 4, 1993).

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's published order entered on August 9, 1993 is being published by the Clerk's Office as Slip Op. 93–160 on August 12, 1993.

(Slip Op. 93–160)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., ET AL., DEFENDANT-INTERVENORS

Court No. 91–07–00533

(Dated August 9, 1993)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendant's motion for entry of partial final judgment pursuant to Rule 54(b) and other pertinent papers, it is hereby

DECIDED that there is no just reason for delay in entry of final judgment as to paragraph 4(k) of plaintiff's complaint pursuant to Rule 54(b), and it is hereby

ORDERED that a final judgment is entered as to paragraph 4(k) of plaintiff's complaint as decided by this Court in Slip Op. 93–96 (June 4, 1993).

(Slip Op. 93-161)

MITSUBISHI INTERNATIONAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-10-00810

Plaintiff challenges Customs' classification of various components imported for use in a continuous steel casting machine under items 664.10, 680.13, 657.25, 710.80, 680.49, and 685.90, TSUS, claiming the components are properly classifiable under item 674.10, TSUS.

Held: Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise and has demonstrated the merchandise is properly classifiable under item 674.10, TSUS.

(Dated August 12, 1993)

Barnes, Richardson & Colburn (Sandra Liss Friedman and *Frederic D. Van Arnam, Jr.),* for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky); Edward N. Maurer,* Attorney, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff, Mitsubishi International Corporation, challenges the classification and liquidation of its imported merchandise pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515(a) (1988). This Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and, for the reasons which follow, enters judgment for plaintiff.

I. BACKGROUND

A. The Continuous Steel Casting Process:

All of the subject merchandise is involved in the continuous steel casting process. In general, the continuous steel casting process converts liquid metal into solid steel slabs through several steps. Transcript (Tr) at 30, 107. The process begins by placing molten steel in ladles and subjecting the molten steel to various conditioning treatments. *Id.* at 31. Following treatment, the molten steel flows from the ladles into a vessel known as a tundish. *Id.* at 32. A turret device controls the flow of the molten steel from the ladles into the tundish. *Id.* From the tundish, the steel pours into a mold in which the steel begins to solidify by forming a thin shell. *Id.* at 34-35. After the shell forms, the steel passes from the mold into a containment section consisting of several roller assemblies or roller segments. *Id.* at 35. Once in the containment section, the steel is sprayed with water in order to cause further solidification. *Id.* The roller segments in the containment section determine the dimensions of the hardening slabs and convey the slabs into a straightener/withdrawal unit which eliminates curves in the slabs. *Id.* The slabs then proceed to the torch table area in which a torch cut-off machine severs the slabs into pre-determined lengths. *Id.* at 37. After severance, the steel moves to a torch runout table for deburring and weighing. *Id.* Finally, the slabs pass to the piling area and then go into storage for eventual distribution. *Id.*

B. The Merchandise:

The merchandise at issue consists of fifteen components of a continuous steel casting machine imported as part of a continuous steel casting plant.[1] *Id.* at 26. Each of the components, except for one,[2] was "specially designed to operate exclusively with the continuous casting machine for which they were imported." Pre-Trial Order, Sched C paragraph 11. The components and their functions may be described as follows:

1. *Ladle Rotator for Ladle Turret:*

The ladle rotator for ladle turret is a large electromechanical device that contains bearings, rolls, frame and drive elements, such as gear boxes, gears, and electric motors. *Id.* at 65. The rotator serves to hold the ladles containing molten steel and to control the ladles' pivoting action during pouring. *Id.* at 65–66. The component weighs approximately forty to fifty tons and measures fifteen feet wide by twenty feet high. *Id.*

2. *Segment Exchange Car:*

The segment exchange car is also a large electromechanical device. *Id.* at 67. The car consists of wheels, drive elements, and control equipment for positioning. *Id.* at 68. The component is mounted on the casting machine and moves backward and forward over the bow of the caster. *Id.* at 67. The purpose of the car is to remove and replace segment from the casting machine should the segment in place fail or become damaged. *Id.* at 67. The component is approximately twenty to twenty-five feet long, eight feet wide, and fifteen feet high. *Id.* at 68.

3. *Segment Swing Guide:*

The segment swing guide is part of the continuous casting machine's segment removal system. *Id.* at 68. This component stands on either side of the casting machine and contains structural elements, hydraulic cylinders, cable, and a winch. *Id.* at 68–69. The swing guide works with the segment removal guide and pivots upon a fixed pivot point in response to the segment removal guide's movements. *Id.* at 68. The component is approximately twenty-five feet long, three feet wide, and two feet high, and weighs ten to fifteen tons. *Id.* at 69.

4. *Segment Removal Guide:*

The segment removal guide is also part of the continuous casting machine's segment removal system and is located on either side of the casting machine. *Id.* at 69. As its name suggests, the component's function is to guide the segment upon removal from the casting machine. *Id.* Operators bend and machine the removal guide to the exact position of the segment before removing the segment. *Id.* at 69–70. The component consists of structural steel and measures approximately forty feet long, two feet wide, and forty feet high. *Id.* The guide weighs sixty to eighty tons. *Id.*

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[1] Before trial the parties stipulated to the classification of a sixteenth component, the roller segment with drive unit, under item 674.10, TSUS (1986). Pre-Trial Order, Sched C paragraph 12.

[2] The single component not specially designed is the ladle rotator for ladle turret, which the parties described as collateral equipment." Pre-Trial Order, Sched C paragraph 13.

5. *Ladle Rotating Unit:*

The ladle rotating unit operates during the pouring stage of the steel process and serves to orient the ladles' nozzles. *Id.* at 70. The unit contains very large bearings, driving elements, support bases, and bases upon which to place ladles. *Id.* The component measures twenty-five feet long, fifteen feet wide, and fifteen to twenty feet high, and weighs approximately thirty to forty tons. *Id.*

6. *Tundish Car:*

The tundish car supports, regulates, and transports the tundish—the vessel into which the ladles pour molten steel and from which the steel pours into the molds. *Id.* at 32, 71. In addition to positioning the tundish to receive molten steel from the ladles, the car has a lifting apparatus which regulates the depth of the nozzles of the tundish which extend into the molds. *Id.* at 33. The car is also equipped with a weight-sensing device that controls the amount of steel that can pass into the tundish. *Id.* Moreover, the component houses argon gas load cells used in pouring the molten steel and hydraulics that control the slide gate at the bottom of the tundish. *Id.* at 32, 34, 71. The tundish car measures forty feet long, twenty-five feet wide, and twelve feet high, and weighs approximately seventy to eighty tons. *Id.* at 71.

7. *Tundish Lifting System:*

The tundish lifting system is the lifting apparatus contained in the tundish car that controls the height of the tundish. *Id.* at 71–72. The system itself consists of two motorized devices or frames located on both sides of the tundish and about fifteen feet apart. *Id.* at 73–74. The mechanized portion of each frame contains a gear box, motor, brakes, and position control. *Id.* at 73. Each frame measures four feet wide and five to six feet high, and together the frames weigh approximately ten to twenty tons. *Id.* at 73–74.

8. *Heat Protector for Ladle Turret:*

The heat protector protects the casting machine, and the ladle turret in particular, against splashes and spills of molten steel. *Id.* at 75. The component has two parts, both of which consist of metal that is one quarter of an inch thick. *Id.* at 75–76. One part is located at the ladle turret's base and the other on the ladle turret's arm. *Id.* at 75. The former part is approximately thirty feet long and four feet high, and weighs nearly five tons. *Id.* The latter part measures six feet long and three feet wide. *Id.* at 76.

9. *Torch Table:*

The torch table's function is to hold and convey steel slabs during the final forming operation when the torch cutting machine cuts the slabs into predetermined sizes. *Id.* The component consists of two frames on which rollers with bearings and drives are mounted. *Id.* The two frames are connected and have four wheels which are mounted on a rail. *Id.* The table measures approximately thirty-five feet long, five feet wide, and five feet high, and weighs thirty-five to forty tons. *Id.*

10. *Mold and Mold Cover:*

The mold is a set of water-cooled copper plates that forms a rectangular shape into which molten steel is poured. *Id.* at 77. The plates' water-cooling system removes heat from the molten steel in order to initiate solidification and slab formation. *Id.* The mold is approximately twenty-five feet long, five feet wide, three feet high, and weighs about thirty-five tons. *Id.*

The mold cover has two parts. *Id.* at 78. The first part is a stationary piece affixed to the bottom portion of the mold. *Id.* This part seals the steam exhaust chamber located beneath the mold and enables the chamber to remove steam. *Id.* The second part is a moving piece attached to the top part of the mold. *Id.* This part oscillates in conjunction with the mold's continuous movements. *Id.* The function of this piece is to protect the mold and the casting machine's other equipment against spills that may occur from the tundish or ladles. *Id.* The cover is about twenty-five feet long, six feet wide, and three feet high, and weighs seven to ten tons. *Id.*

11. *Mold Stopper Bracket:*

The mold stopper bracket is part of the mold and locates the mold on the casting machine's floor. *Id.* at 79. The bracket is two feet wide, one foot high, and six inches thick, and weighs approximately one hundred pounds. *Id.*

12. *Slag Box:*

The slag box is an insulated metal box that stands on either side of the casting machine's mold. *Id.* The purpose of the box is to serve as a receptacle for molten steel in emergency situations. *Id.* at 34, 80. For example, in the event the steel flow from the tundish into the mold became uncontrollable, an operator could shift the tundish from the casting position over the mold to a position over the slag box. *Id.* The component is approximately twenty feet long, five feet wide, and three feet deep. *Id.* at 80.

13. *Roll Gap Measuring Device:*

The roll gap measuring device monitors the roller segments in the casting machine's containment section. The purpose of the device is to measure the gap formed by the roller segments and transmit the measurement to a computer which logs the segments' location. *Id.* at 81. This component measures three feet long, seventy-six inches wide, and nine inches high. *Id.* at 82.

14. *Drive Roll Unit:*

The drive roll unit works in conjunction with the roller segments in the casting machine's containment section. *Id.* Each roller segment has two drive roll units which enable the segments to move slabs continuously through the machine. *Id.* As the machine casts the steel passing through the containment section, the drive roll units pinch the slab being cast and withdraw the slab from the machine. *Id.* Each unit contains

a universal spindle, gear box, electric motor and brake, all of which are mounted on a support structure. *Id.* The component measures four feet long, three feet wide, and five feet high, and weighs approximately two tons. *Id.* at 82–83.

15. *Mold Pendant Box:*

At the time of importation, the mold pendant box is an empty housing panel that is designed to hold the electronics, control devices, and displays which direct the casting process. *Id.* at 36, 83. Once the box is equipped, the box is mounted on a pivoting and swiveling arm affixed to the ladle operator platform. *Id.* at 83. This component is six feet wide, six feet tall, and two feet thick, and weighs approximately two tons before being equipped. *Id.*

C. Relevant Statutory Provisions:

Plaintiff relies on the following provisions of the Tariff Schedules of the United States (TSUS).

1. *Schedule 6, Part 4, Subpart F:*

Item 674.10 Converters, ingot molds, and casting machines, all the foregoing of types used in metallurgy and in metal foundries, and parts thereof * * *.

2. *General Headnotes and Rules of Interpretation:*

10. *General Interpretative Rules*: For the purposes of these schedules—

* * * * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.[3]

Defendant relies on the following TSUS provisions:

1. *Schedule 6, Part 4, Subpart B:*

Item 664.10 Elevators, hoists, winches, cranes, jacks, pulley tackle, belt conveyors, and other lifting, handling, loading, or unloading machinery, and conveyors, all the foregoing and parts thereof not provided for in item 664.06, 664.07, or 664.08 * * *.

2. *Schedule 6, Part 4, Subpart F:* Molds of types used for metal (except ingot molds), for metallic carbides, for glass, for mineral materials, or for rubber or plastics materials (con.):

Item 680.13 Other * * *.

3. *Schedule 6, Part 3, Subpart G, Headnote 1:* This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.

[3] Defendant also relies on General Interpretative Rule 10(ij).

4. *Schedule 6, Part 3, Subpart G:* Articles of iron or steel, not coated or plated with precious metal (con.):
Other articles (con.):
Other (con.):
Item 657.25 Other: * * *.

5. *Schedule 7, Part 2, Subpart C:* Drafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribers, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; hand styluses; micrometers, calipers, gauges, balancing machines, and non-optical measuring or checking instruments, apparatus, and machines not specially provided for; and parts of the foregoing articles:

* * * * * * *

Item 710.80 Other * * *.

6. *Schedule 6, Part 4, Subpart J:* Gear boxes and other speed changers with fixed, multiple, or variable ratios; pulleys and shaft couplings; pillow blocks; flange, take-up, cartridge, and hanger units; torque converters; chain sprockets; clutches and universal joints; all the foregoing (except parts of agricultural or horticultural machinery and implements provided for in item 660.00 and parts of motor vehicles and bicycles) and parts thereof:
Gear boxes and other speed changers, and parts thereof:
Fixed ratio speed changers, multiple and variable ratio speed changers each ratio of which is selected by manual manipulation, and parts thereof:

* * * * * * *

Item 680.49 Other * * *.

7. *Schedule 6, Part 5:*
Item 685.90 Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof * * *.

D. Customs' Classifcations:

The United States Customs Service (Customs) classified the subject components under various TSUS provisions. Customs' original classifications may be summarized as follows:

Item 664.10, TSUS:

(1) ladle rotator for laddle turret;
(2) segment exchange car;

(3) segment swing guide;
(4) segment removal guide;
(5) ladle rotating unit;
(6) tundish car;
(7) tundish lifting system;
(8) heat protector for laddle turret;
(9) torch table; and,
(10) drive roll unit.

Item 680.13, TSUS:

(1) mold and mold cover;
(2) mold stopper bracket; and,
(3) mold pendant box.

Item 657.25, TSUS:

(1) slag box.

Item 710.80 TSUS:

(1) roll gap measuring device.

Pre-Trial Order, Sched D-2, E-2 paragraph 1; Sched F paragraphs 1–4. Based on information obtained during discovery, Customs subsequently changed its classification of the drive roll unit and mold pendant box to items 680.49 and 685.90, TSUS, respectively. *Id.* at Sched D-2, E-2 paragraph 1; Sched F paragraphs 5–6.

Plaintiff filed timely protests pursuant to 19 U.S.C. § 1514(a) (1988) to contest Customs' classifications. Customs subsequently denied the protests under 19 U.S.C. § 1515 (1988) and, after having paid all liquidated duties, plaintiff commenced this action within the time allowed by law. This Court has jurisdiction under 28 U.S.C. § 1581(a) (1988).

II. Contentions of the Parties

A. Plaintiff:

Plaintiff advances several arguments in support of its position. First, plaintiff argues that General Interpretative Rule (GIR) 10(ij) requires Customs to classify the merchandise under item 674.10. According to plaintiff, the "parts" definition contained in GIR 10(ij) includes articles that, at the time of importation, "are dedicated solely for use" upon another article, citing *United States v. Pompeo,* 43 CCPA 9, 14, C.A.D. 602 (1955). Plaintiff urges that because the subject components were "dedicated solely for use" upon a continuous casting machine, the components are parts of casting machines under item 674.10.

Second, plaintiff claims the components' primary function and sole reason for importation were for use as parts of a continuous steel casting machine. Plaintiff maintains that whatever general handling functions the components may be able to perform are ancillary to the components' principal use as parts of a continuous steel casting machine, citing *United States v. De Laval Separator Co.,* 65 CCPA 48, 50–51 C.A.D. 1204, 569 F.2d 1134, 1135–36 (1978). Therefore, plaintiff asserts, the components' non-casting machine functions do not preclude classification under item 674.10 as parts of casting machines.

Third, plaintiff contends the items under which Customs classified the merchandise do not more specifically provide for the merchandise than item 674.10. In essence, plaintiff asserts that Customs incorrectly interpreted GIR 10 (ij). Plaintiff acknowledges that GIR 10(ij) requires Customs to classify "parts" under the TSUS item that specifically provides for the parts or that provides for the parts *eo nomine*.[4] Plaintiff claims, however, the items relied upon by Customs are "sweeping in scope" rather than specific and that the *eo nomine* exemplars used in these items do not encompass plaintiff's merchandise, citing *De Laval*, 65 CCPA at 50, 569 F.2d at 1136. According to plaintiff, because Customs used broad-based items and items whose *eo nomine* exemplars do not include the components at issue, item 674.10's provisions for "casting machines" and "parts thereof" demonstrate that item 674.10 more specifically provides for the components than the items selected by Customs. As a result, plaintiff maintains that none of the items that Customs chose is a "specific provision" applicable to the subject merchandise within the meaning of GIR 10(ij).

Finally, plaintiff urges that the "more than" doctrine requires Customs to classify the merchandise under item 674.10. According to plaintiff, the "more than" doctrine precludes Customs from classifying an article under an *eo nomine* provision for the article if the article is "more than" the items described by the provision. As applied to this case, plaintiff argues that because each component's major function is to "perform together as a single, integrated and customized casting machine," Customs' reliance on more generalized provisions for "handling" and "conveying equipment," and "articles of iron or steel," is inconsistent with the "more than" doctrine. In short, plaintiff asserts that the items upon which Customs relies overly simplify the components' functions and overlook the fact that the components' sole application is in the continuous steel casting machine. Moreover, plaintiff claims that because the subject components differ from, or are "other than," the *eo nomine* exemplars found in the TSUS items selected by Customs, the components are clearly "more than" the articles described by those items, citing *W.Y. Moberly, Inc. v. United States,* 13 CIT 502, 510, 727 F. Supp. 1456, 1462 (1989), *aff'd,* 9 Fed. Cir. (T) ____, 924 F.2d 232 (1991).

B. Defendant:

Defendant contends Customs properly classified the imported components under items 664.10, 680.13, 657.25, 710.80, 680.49, and 685.90. The crux of defendant's position is that each of these items specifically provides for the subject components and therefore, under GIR 10(ij), these items should prevail over the more general "parts" provisions upon which plaintiff relies. Defendant devotes most of its argument to demonstrating that the TSUS items selected by Customs are "specific" within the meaning of GIR 10(ij) and that these items more spe-

[4] "An *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce." RUTH F. STURM, CUSTOMS LAW AND ADMINISTRATION, § 53.2, at 3 (3d ed. 1991) (citing *United States v. Bruckmann,* 65 CCPA 90, C.A.D. 1211, 582 F.2d 622 (1978)).

cifically provide for the subject components than the items suggested by plaintiff.

First, defendant claims the specificity of the items chosen by Customs appears in each item's totality rather than in each item's individual parts. For example, defendant maintains the "lifting, handling, loading, or unloading" functions or uses described in item 664.10 should be considered in conjunction with the types of articles described in the item, namely "elevators, hoists, winches, cranes, jacks, pulley tackle, [and] belt conveyors." Defendant appears to suggest that, when viewed together, the article and use descriptions show the item specifically provides for the articles named and all articles that have the uses described by the item.

Alternatively, defendant asserts that, even when read in isolation, the use provisions of item 664.10 are more specific than the "parts" provisions upon which plaintiff relies, citing *Robert Bosch Corp. v. United States,* 63 Cust. Ct. 187, 192–93, C.D. 3,895, 305 F. Supp. 921, 924–26 (1969). In addition, defendant claims that despite the fact that the use provisions may be generic, the generic terms contained in 664.10 are more specific than the "parts" provisions advanced by plaintiff for purposes of GIR 10(ij), citing *Bosch,* 63 Cust. Ct. at 193, 305 F. Supp. at 925.

In addition, defendant argues that the subject components' handling, lifting, loading, and unloading operations are the components' primary functions within the meaning of item 664.10. For example, defendant notes that the primary function of the tundish lifting system is to lift the tundish and, as such, is within the purview of item 664.10. Moreover, defendant claims item 664.10 applies to all articles described by the item regardless of whether the article performs the described functions in a general or specific manner, citing *Amalgamated Sugar Co. v. United States,* 60 Cust. Ct. 268, C.D. 3,361, 281 F. Supp. 373 (1968). Therefore, according to defendant, the mere fact that the components perform the functions delineated in item 664.10 in the specific context of a continuous steel casting machine does not preclude classification of the components under the item.

Finally, defendant addresses three components individually. With respect to the slag box, defendant urges Customs properly classified the article under item 657.25. Although defendant acknowledges item 657.25 "is not a 'specific provision'" within the meaning of GIR 10(ij) and the slag box is "indisputably essential for safe operation of the casting line," defendant nevertheless claims the slag box is not a casting machine part because it is not actually involved in the casting process. With respect to the roll gap measuring device and mold pendant box, defendant argues that items 710.90 and 685.90, respectively, specifically provide for the components and thus preclude classification under item 674.10, citing Schedule 6, Part 4, Headnote 1(v). Moreover, defendant asserts plaintiff failed to rebut the evidence of record showing that items 710.90 and 685.90, respectively, describe the roll gap measuring device and mold pendant box.

III. Discussion

A. Presumption of Correctness:

As in all customs cases, a statutory presumption of correctness attaches to classifications by the Customs Service and the party challenging the classification has the burden of overcoming this presumption. 28 U.S.C. § 2639(a)(1) (1988). To determine whether an importer has overcome the statutory presumption, the Court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

B. Application of General Interpretative Rule 10(ij):

In order to apply GIR 10(ij) to the subject merchandise, the Court must conduct a two-part inquiry. GIR 10(ij) indicates that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." GIR 10(ij). Whereas the rule's first clause provides a basic definition for "parts," the rule's second clause indicates how to classify a part when more than one tariff item provides for the part. *See, e.g., De Laval,* 65 CCPA at 49–50, 569 F.2d at 1135–36 (deciding whether imported farm tanks are "parts" of refrigerators before determining which of the competing tariff items should prevail). The second clause, therefore, is only applicable when a "part" is in issue.

Accordingly, before the Court may consider whether the TSUS items selected by Customs more specifically provide for the subject merchandise under the second clause of GIR 10(ij), the Court must first determine whether the components are "parts" under GIR 10(ij)'s first clause. Because this determination requires the Court to consider the article for which plaintiff imported the components—the continuous steel casting machine—, the Court must also decide whether the components are casting machine parts under item 674.10. For the reasons which follow, the Court concludes that the subject components are "parts" under GIR 10(ij) and casting machine parts under item 674.10. The Court concludes further that the various TSUS items chosen by Customs do not more specifically provide for the components and that the components are properly classifiable as casting machine parts under item 674.10.

1. *"Parts" Inquiry:*

GIR 10(ij) requires the Court to make a threshold inquiry as to whether the subject components are "parts" within the purview of GIR 10(ij). Case law has clarified the "parts" inquiry necessitated by the first clause of GIR 10(ij). In order to decide whether an item is "solely or chiefly used as a part of [an] article," the Court must consider the "nature, function and purpose of an item in relation to the article to which it is attached or designed to serve." *Ideal Toy Corp. v. United States,* 58 CCPA 9, 13, C.A.D. 996, 433 F.2d 801, 803 (1970) (citing *Gallagher*

& Ascher Co. v. United States, 52 CCPA 11, 13–14, C.A.D. 849 (1964)). In general, "a 'part' of an article is something necessary to the completion of that article * * *. [I]t is an integral, constituent, or component part, without which the article to which it is joined, could not function as such article." *Gallagher,* 52 CCPA at 14 (citing *United States v. Willoughby Camera Stores,* 21 CCPA 322, 324, T.D. 46,851 (1933)). Nevertheless, the mere "fact that the article operates, functions or can be used without the item is not determinative." *Ideal Toy,* 58 CCPA at 13, 433 F.2d at 803 (citing *Trans Atlantic Co. v. United States,* 48 CCPA 30, C.A.D. 758 (1960)).

In this case, plaintiff has amply demonstrated that each of the subject components is integral to the casting machine's operation. Plaintiff introduced several exhibits which indicate that each of the subject components has a specialized and necessary function in the overall casting process. *See* Pl's Exhibs 1–2, 4, 6–7. The exhibits emphasize each component's particular contribution to the casting process in order to explain the casting machine's operation. In addition, plaintiff's expert witness thoroughly described the components' specialized functions within the overall casting process. Tr at 31–39, 65–83. These descriptions, set out in detail above, show that each of the components plays an essential and unique role in the casting machine's operation and in the overall casting process.

Defendant, on the other hand, did not offer any evidence which disputed plaintiff's expert's descriptions. More significant, however, is the fact that defendant's expert witness expressly agreed with plaintiff's expert witness' characterization of each component's function and of the casting process. Tr. at 121. Moreover, while defendant asserts in its papers that the slag box (component number twelve) is not a casting machine part because it is not involved in the casting process, defendant and its expert both indicated that the safety features provided by the component are integral to the casting process. Def's Post-Trial Brief at 10; Tr at 119–20. Notwithstanding defendant's and defendant's expert's positions, even assuming the slag box is not *per se* involved in the casting process and the process could occur without the slag box, the fact that slag box's sole purpose is to secure the casting machine's operation is enough to establish that the component is integral to the machine. *See Ideal Toy,* 58 CCPA at 13, 433 F.2d at 803. Because all of the subject components satisfy a specific and integral need in the casting machine's operation, the Court concludes that all of the components are "parts" under GIR 10(ij) and casting machine parts under item 674.10. *See id.; Gallagher,* 52 CCPA at 14.

The fact that the subject components are "dedicated for use" in the casting machine further compels this conclusion. Where items are "dedicated for use" upon an article and can not apply to any other purpose, courts have generally found the items to be parts of the article for which they were imported. *See Pompeo,* 43 CCPA at 13; *Ideal Toy Corp. v. United States,* 63 Cust. Ct. 406, 411, C.D. 3926 (1969). In *Pompeo,* the

Court of Customs and Patent Appeals (CCPA) addressed the issue of whether engine superchargers for Ford and Austin automobiles were automobile parts. The Customs Court had held that the superchargers were automobile parts based upon, in part, the following findings: (1) "the imported superchargers [were] designed specifically for use on automobiles;" (2) "the Ford engine and the Austin engine will operate if no supercharger has been installed therein;" and (3) "once a supercharger has been installed * * * the engine will not operate if the supercharger fails." *Pompeo,* 43 CCPA at 10–11. The CCPA affirmed the trial court's holding, reasoning that "where an article at time of importation is dedicated to a specific use, the question of whether the article is a part must be determined from the nature of the article as applied to that use." *Id.* at 14. Because the superchargers were dedicated for use in the Ford and Austin engines and the engines could not operate if the superchargers were to fail after installation, the appellate court concluded that the superchargers were automobile parts. *Id.* at 14.

Similar to *Pompeo,* the record in this case is replete with evidence demonstrating that the subject components are dedicated for use in the casting machine for which they were imported. As previously indicated, the parties stipulated that all of the components except for the ladle rotator for ladle turret were "specially designed to operate exclusively with the continuous casting machine for which they were imported." Pre-Trial Order, Sched C paragraph 11. This stipulation by itself clearly indicates that plaintiff imported the components, except for the ladle rotator for ladle turret, solely for use in the continuous casting machine. Notwithstanding the exception for the ladle rotator for ladle turret in the parties' stipulation, defendant's expert witness testified during trial that all of the components, including the ladle rotator for ladle turret, were customized for use in the casting machine for which they were imported and could not be used in any other machine without alteration. Tr at 129–31. Because the parties' stipulation and defendant's expert's testimony indisputably show that, as imported, the subject components can only function in the casting machine, the Court finds that the components are "dedicated for use" in and are parts of the casting machine for which they were imported. *See Pompeo,* 43 CCPA at 13. Accordingly, the Court concludes that all of the components are "parts" under GIR 10(ij) and casting machine parts under item 674.10.

2. *Specificity Inquiry:*

The Court now turns to the second clause of GIR 10(ij) in order to determine whether the various TSUS items selected by Customs more specifically provide for the subject components so as to preclude the application of item 674.10.[5] For the reasons which follow, the Court concludes that none of the items chosen by Customs more specifically pro-

[5] As indicated previously, item 674.10 encompasses "[c]onverters, ingot molds, and *casting machines,* all the foregoing of types used in metallurgy and in metal foundries, and *parts thereof* * * *." (Emphasis added).

vides for the components than item 674.10 and that all of the components are classifiable under item 674.10.

a. Components Classified Under Item 664.10:

Customs classified nine of the subject components under item 664.10. These components include the following: (1) ladle rotator for laddle turret; (2) segment exchange car; (3) segment swing guide; (4) segment removal guide; (5) ladle rotating unit; (6) tundish car; (7) tundish lifting system; (8) heat protector for laddle turret; and, (9) torch table. Item 664.10 applies to "[e]levators, hoists, winches, cranes, jacks, pulley tackle, belt conveyors, and other lifting, handling, loading, or unloading machinery, and conveyors, all the foregoing and parts thereof not provided for in item 664.06, 664.07, or 664.08 * * *."

Defendant contends that the use functions described in item 674.10, such as "lifting, handling, loading, or unloading," more specifically provide for the subject components than item 664.10's parts provision. To support its position, defendant cites the Customs Court's decision in *Bosch*, 63 Cust. Ct. at 187, 305 F. Supp. at 921. The *Bosch* court considered whether an automobile radio and radio antenna were properly classifiable as automobile parts under item 692.27 or as radiotelegraphic and radiotelephonic transmission and reception apparatus under item 685.22. *Id.* at 187, 305 F. Supp. at 921–22. The court held that item 685.22 more specifically provided for the merchandise within the meaning of GIR 10(ij) than item 692.27 and therefore precluded item 692.27 from applying to the merchandise. *Id.* at 191, 305 F. Supp. at 925. In reaching its holding, the *Bosch* court emphasized that a generic term for an article will satisfy GIR 10(ij)'s specificity requirement and found that item 685.22's provisions for "radiotelegraphic and radiotelephonic transmission and reception apparatus" were generic terms that specifically provided for the radio and radio antenna at issue. *Id.* at 193, 305 F. Supp. at 924–25. Defendant suggests that item 664.10's provisions for "lifting, handling, loading, or unloading machinery" are generic terms which, like item 685.22's provisions for "radiotelegraphic and radiotelephonic transmission and reception apparatus," satisfy GIR 10(ij)'s specificity requirement and preclude classification under 674.10.

Defendant's reliance on *Bosch* is misplaced. This Court interprets *Bosch* to have concluded that item 685.22's provision for "radiotelegraphic and radiotelephonic transmission and reception apparatus" applied to the automobile radio and antenna at issue because the provision's terminology embraced all radio apparatus, even though the item did not specify car radio apparatus. *See id.* at 191–93, 305 F. Supp. at 924–26. *Bosch* did not employ the term "generic" in the broad sense suggested by defendant. Rather, the court used the term to describe how item 685.22 identifies a class of specifically-defined equipment. *Id.* at 191, 305 F. Supp. at 924 (Congress "has merely substituted more sophisticated terminology for that in common use, but in so doing has not obscured the identity of the articles it intended to include."). Defendant's application of *Bosch* to the instant case would render item 674.10 and,

conceivably, numerous other parts provisions meaningless. *See, e.g., United States v. General Elec. Co.*, 58 CCPA 152, 156, C.A.D. 1021, 441 F.2d 1186, 1189 (1971) ("[A] seemingly broad descriptive tariff term is not to be taken as encompassing every article which may literally come within that term * * *. "). In sum, the terms "lifting, handling, loading, or unloading machinery" do not describe "a special or particular sort or kind of thing" in a manner that satisfies the specificity requirement contained in GIR 10(ij). *Bosch*, 63 Cust. Ct. at 191, 305 F. Supp. at 924.

The merchandise and TSUS items at issue in the instant case are akin to the merchandise and items addressed in *De Laval*, 65 CCPA at 48, 569 F.2d at 1134. In *De Laval*, the CCPA considered whether refrigerator tanks were properly classifiable as refrigerator parts under item 661.35 or as "on-farm equipment for the handling or drying of agricultural or horticultural products, and agricultural and horticultural implements not specially provided for, and any parts of the foregoing" under item 666.00. *Id.* at 49, 569 F.2d at 1136. The court held that item 666.00 did not more specifically provide for the merchandise because the item's provisions "encompass countless other products which find utility on a farm" and are, therefore, "sweeping in scope." *Id.* at 50, 569 F.2d at 1136. The court also reasoned that neither of item 666.00's provisions was an *eo nomine* or "specific provision" for the subject merchandise as that term is used in GIR 10(ij). *Id.* at 51, 569 F.2d at 1136.

Similar to the item discussed in *De Laval*, item 664.10 lacks the specificity necessary to preclude the application of item 674.10. As with item 666.00 in *De Laval*, item 664.10's language clearly "encompass[es] countless other products" and is "sweeping in scope." *Id.*, 569 F.2d at 1136. Defendant's interpretation of item 664.10 would enable the item to embrace virtually *any* mechanized device that performs any kind of "lifting, handling, loading, or unloading" function. Such a literal interpretation improperly glosses over the specialized functions such devices may perform *in addition to the functions described in the item* and which, as in the instant case, are highly germane to the devices' classification. As a result, the Court concludes item 664.10 does not specifically provide for the subject components and classification is proper under item 674.10.[6] Moreover, the fact that item 664.10's provisions for "lifting, handling, loading, or unloading machinery" are not *eo nomine* further supports the Court's conclusion that the item is not specific within the meaning of GIR 10(ij). *See id.*

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[6] Contrary to defendant's suggestion, nothing in the Tariff Commission's studies establishes the specificity of item 664.10. *See* UNITED STATES TARIFF COMM'N, TARIFF CLASSIFICATION STUDY, SEVENTH SUPPLEMENTAL REPORT 99 (1963) (noting that a "parts" provision is not more specific than a provision for, among other items, "illuminating articles"). Item 664.10's provisions for "lifting, handling, loading, or unloading machinery" are clearly *not* as specific as the "illuminating articles" which the Tariff Commission found to be more specific than a "parts" provision. The terms "illuminating articles," like the terms "radiotelegraphic and radiotelephonic transmission and reception apparatus" discussed in *Bosch*, generically describe an entire class of articles – lamps. As discussed above, item 664.10 does not generically describe a class of articles; it only describes a particular kind of function that any number of articles may perform. Accordingly, the Court finds defendant's reliance on the Tariff Commission's studies to be misplaced.

b. Components Classified Under Item 680.49:

Customs classified one component under item 680.49, the drive roll unit. Item 680.49 applies to the following merchandise:

> Gear boxes and other speed changers with fixed, multiple, or variable ratios; * * * all the foregoing * * * and parts thereof: Gear boxes and other speed changers, and parts thereof: Fixed ratio speed changers, multiple and variable ratio speed changers each ratio of which is selected by manual manipulation, and parts thereof: * * * Item 680.49 Other * * *.

The evidence received by the Court pertaining to the drive roll clearly indicates item 680.49 does not more specifically provide for the drive roll unit than item 674.10. By its terms, item 680.49 embraces, among other items, gear boxes and other speed changers. Yet, as discussed previously, the testimony of both plaintiff's and defendant's expert witnesses indicated that the drive roll unit contains, *in addition to a gear box,* a universal spindle, electric motor and brake. Tr at 82, 121. Moreover, the component functions in a manner that is inconsistent with an article that only contains a gear box or speed changer. Defendant's expert witness testified that the drive roll unit pinches the steel slabs and brakes the slabs' motion so as to prevent the slabs from escaping from the molds. *Id.* at 116. Even assuming the component's gear box controlled the pinching and braking actions described by defendant's expert, the fact that the component performs these actions demonstrates that the component is not merely a gear box or speed changer within item 680.49. *See United States v. Sutherland Int'l Despatch,* 21 CCPA 264, 266 68, T.D. 46,790 (1933) (finding that window channels consisting of a brass channel and felt lining are outside the purview of the *eo nomine* description of "channels" because the channels' elements and uses are more than the description provided); *Moberly,* 13 CIT at 510, 727 F. Supp. at 1462. As a result, the Court finds item 680.49 does not adequately describe the drive roll unit and, therefore, does not more specifically provide for the component than item 674.10. Accordingly, the Court concludes the component is properly classifiable under item 674.10.

c. Components Classified Under Item 680.13:

Customs classified two of the components under item 680.13, the mold and mold cover, and the mold stopper bracket. Item 680.13 applies to the following articles: "Molds of types used for metal (except for ingot molds), for metallic carbides, for glass, for mineral materials, or for rubber or plastics materials (con.): Item 680.13 * * * Other * * *."

The evidence before the Court does not support Customs' classification under item 680.13. As is pertinent to this case, the word "mold" commonly describes, among other items, "a cavity in which a fluid or malleable substance is given form * * *." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1454 (1st ed 1986). The evidence received by the Court indicates the two components at issue are more than mere cavities "in which a fluid or malleable substance is given form." As explained

by plaintiffs expert witness, in addition to shaping the molten steel, the mold itself removes heat from the steel in order to initiate solidification and slab formation. Tr at 77. The mold cover, on the other hand, does not perform any shaping functions whatsoever. The cover seals the steam exhaust chamber located beneath the mold, enables the chamber to remove steam, and protects the mold and other equipment from steel spills. *Id.* at 78. Likewise, the mold stopper bracket fixes the mold on the casting machine's floor, but does not shape the steel in any manner. *Id.* at 79. Defendant did not offer any evidence to contradict plaintiff's expert's testimony. *See id.* at 106. Moreover, defendant's expert witness expressly agreed with plaintiff's expert's descriptions. *Id.* at 121. Accordingly, the Court finds item 680.13 does not adequately describe the mold and mold cover, and the mold stopper bracket and, therefore, does not more specifically provide for the components than item 674.10. Thus, the Court concludes the components are properly classifiable under item 674.10.

d. Components Classified Under Item 685.90:

Customs classified one component under item 685.90, the mold pendant box. Item 685.90 applies to the following merchandise:

> Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof * * *.

The evidence before the Court does not support Customs' classification of the mold pendant box under item 685.90. Though defendant's expert characterized the component as a "control panel" that holds the controls for the mold for oscillation cycles and tundish car,[7] the evidence received by the Court militates against such a narrow characterization. The totality of the evidence presented by plaintiff clearly indicates the component is an integral part of the overall steel casting process and has no other function but in the casting machine for which it was imported. *See id.* at 11, 83. In short, the mold pendant box is essential to the safe and controlled operation of the casting machine. Because item 685.90's terms do not encompass the mold pendant box's essential functions, the Court finds the item does not more specifically provide for the component than item 674.10's provision for casting machine parts. *See Sutherland,* 21 CCPA at 266–68; *Moberly,* 13 CIT at 510, 727 F. Supp. at 1462. As a result, the Court concludes that the mold pendant box is properly classifiable under item 674.10.

e. Components Classified Under Item 657.25:

Customs classified the slag box under item 657.25. This item applies to "[a]rticles of iron or steel, not coated or plated with precious metal

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[7] Tr at 106.

(con.): Other articles (con.): Other (con.): Other: * * *." A related provision, Schedule 6, Part 3, Subpart G, Headnote 1 (Headnote 1), indicates that item 657.25 "covers only articles of metal *which are not more specifically provided for elsewhere in the tariff chedules*." (Emphasis added).

The Court's previous finding that the slag box is a casting machine part under item 674.10 compels the conclusion that item 657.25 does not specifically provide for the component under GIR 10(ij). The only evidence defendant offered with respect to the slag box was the testimony of its expert indicating that the component is a "metal box" that is not part of the continuous casting machine. Tr at 106. As discussed previously, however, plaintiff amply demonstrated that the component is involved in the casting process and, because it provides an integral safety feature for the safe operation of the casting machine, is a casting machine part under item 674.10. The fact that the slag box performs a distinct and integral safety function in the casting machine also indicates the component is not merely a "metal box" and distinguishes the component from the general class of articles to which item 657.25 applies. As a result, the Court concludes item 674.10 more specifically provides for the slag box than item 657.24 and the component is properly classifiable under item 674.10.

f. Components Classified Under Item 710.80:

Customs classified the final component at issue, the roll gap measuring device, under item 710.80. This item applies to the following merchandise:

> Drafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs, drawing curves, rulers, scribers, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; hand styluses; micrometers, calipers, gauges, balancing machines, and non-optical measuring or checking instruments, apparatus, and machines not specially provided for; and parts of the foregoing articles: * * *. Other * * *.

The evidence before the Court does not support Customs' classification of the roll gap measuring device under item 710.80. Plaintiff adequately demonstrated that the roll gap measuring device is integral to the casting machine's functioning. The testimony of both plaintiff's and defendant's expert witnesses indicates that the device measures and records the gap formed by the casting machine's roller segments and conveys the measurements to a computer which monitors the segments' location. Tr at 81–82, 107. This testimony establishes that, in addition to measuring the roller segments, the device interacts with the casting machine's computers, thereby facilitating the machine's overall operations. In sum, the testimony shows the component is more than any of the articles described in item 710.80. *See Sutherland,* 21 CCPA at 266–68; *Moberly,* 13 CIT at 510, 727 F. Supp. at 1462. Because item

710.80 does not encompass the functions performed by the roll gap measuring device, the Court finds the item does not more specifically provide for the component than item 674.10. As a result, the Court concludes the component is properly classifiable under item 674.10.

IV. CONCLUSION

The Court holds that plaintiff has overcome the statutory presumption of correctness attached to Customs' classification of the components under items 664.10, 680.13, 657.25, 710.80, 680.49, and 685.90, TSUS. The Court holds further that plaintiff has demonstrated that all of the components are properly classifiable under item 674.10, TSUS.

(Slip Op. 93–162)

YAMAJI FISHING NET CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–11–00790

[Plaintiff's motion for judgment on the agency record is denied. The Department of Commerce's final determination is sustained and the action is dismissed.]

(Dated August 13, 1993)

George R Tuttle, P.C (George R Tuttle, III), for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(Jeffrey M. Telep), Dean Pinkert,* Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff moves for judgment upon the agency record pursuant to Rule 56.1 of this Court. Plaintiff seeks review of *Final Results of Antidumping Duty Administrative Reviews: Fishnetting of Man-made Fibers From Japan,* 56 Fed. Reg. 49,456 (1991) (*Final Determination*). Plaintiff requests that the Court remand this matter to Commerce for submission of additional information or determination of a new best information available (BIA) rate. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

The U.S. Department of Treasury issued an antidumping order in 1972 which covered fishing net made of manmade fibers from Japan. *Fish Netting of Manmade Fibers From Japan,* 37 Fed. Reg. 11,560 (1972). Between 1972 and 1988 Commerce conducted three administrative reviews of the antidumping order, covering various periods of time. *See Fish Netting of Man-Made Fibers From Japan; Final Results of Administrative Review of Antidumping Finding,* 48 Fed. Reg. 43,210 (1983) *(First Review); Fish Netting of Man-Made Fibers From Japan; Final Results of Administrative Review of Antidumping Finding* 49 Fed. Reg. 18,339 (1984) (*Second Review*); *Fishnetting of Man-Made Fibers From Japan; Final Results of Antidumping Duty Administrative Review,* 53 Fed. Reg. 10,264 (1988) *(Third Review).*

In the *First Review,* Yamaji failed to provide questionnaire data for one of the periods under review. As a result, Commerce used BIA and assigned Yamaji a dumping margin of 18.3% for that period. *First Review,* 48 Fed. Reg. at 43,211–12. Commerce assigned Yamaji its previous margin of 18.3% margin for one period of the *Second Review* when it was forced once again to resort to BIA due to Yamaji's failure to respond. *Second Review,* 49 Fed. Reg. at 18,339. During the *Third Review,* Commerce was able to calculate margins based on the information Yamaji provided, thus avoiding the need to resort to BIA. *Third Review,* 53 Fed. Reg. at 10,264.

Commerce's fourth administrative review of the antidumping order, the review at issue, covered three periods: (1) from June 1984 through May 1985; (2) from June 1985 through May 1986; and (3) from June 1986 through May 1987. *Final Determination,* 56 Fed. Reg. at 49,456. On November 15, 1990, Commerce sent plaintiff a supplemental questionnaire asking Yamaji to provide previously submitted information in a computerized format pursuant to 19 C.F.R. § 353.31(e)(3) (1990). R.Doc. 82. Plaintiff responded that it would be financially impractical for it to comply because it did not own a computer. R.Doc. 67. Because Yamaji failed to provide sales listings on computer tape and adequate information on adjustments for physical differences in the merchandise and the viability of its home market, Commerce resorted to BIA. *Preliminary Results of Antidumping Duty Administrative Reviews and Intent To Revoke in Part: Fishnetting of Man-made Fibers From Japan,* 56 Fed. Reg. 33,246, 33,247 (1991) (*Preliminary Determination*). Yamaji did not submit a brief in response to the preliminary determination.

Commerce subsequently published its final determination in which it determined that Yamaji was "substantially cooperative, despite [its] failure to respond to [Commerce's] requests for additional information and [its] failure to respond to certain requests in the form required." *Final Determination,* 56 Fed. Reg. at 49,457. Commerce assigned Yamaji a BIA margin of 18.3% *ad valorem* which was based on the highest margin for Yamaji from any previous review. *Id.*

CONTENTIONS OF THE PARTIES

Plaintiff argues 19 C.F.R. § 353.31(e)(3) (1990), was not in effect at the time Commerce initiated Yamaji's annual review. Therefore, according to Yamaji, Commerce improperly applied the regulation to plaintiff in a retroactive manner. In addition, plaintiff claims Commerce violated the Administrative Procedures Act and the Due Process Clause by failing to notify Yamaji of the formal procedures for waiving the computerized data requirement. Yamaji further argues Commerce failed to notify it of the inadequacy of its response as required by 19 C.F.R. § 353.51(b) (1988). Finally, Yamaji contends its assessed margin of 18.3% is penal in nature and, therefore, should not be applied to a respondent found to be substantially cooperative.

Defendant maintains it complied with all statutory, regulatory and due process requirements, and therefore, its decision to resort to BIA

was in accordance with law. Furthermore, defendant contends because Yamaji failed to provide current information in the proper format, Commerce was entitled to presume the 18.3% margin assessed against Yamaji in a prior review represented Yamaji's actual margin. Commerce argues it could not have failed to notify Yamaji of waiver procedures regarding the requirement of computerized data because such procedures do not exist. In response to plaintiff's claimed violation of the Administrative Procedures Act, defendant claims Commerce did not engage in rulemaking under the Act.

Standard of Review

In an action challenging Commerce's use of BIA, this Court must decide whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

The Court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). "An agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable.'" *ICC Indus., Inc. v. United States,* 5 Fed. Cir. (T) 78, 85, 812 F.2d 694, 699 (1987) (emphasis in original) (citation omitted). Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). However, the agency must not "contravene or ignore the intent of the legislature or the guiding purpose of the statute." *Ceramica Regiomontana,* 10 CIT at 405, 636 F. Supp. at 966 (citations omitted).

Discussion

A. *Computer Tape Requirement:*

Yamaji contends Commerce cannot apply the computer tape requirement of 19 C.F.R. § 353.31(e)(3) (1990) to plaintiff's deficiency questionnaire because (1) the regulation is contrary to congressional intent; and (2) such application produces an improper retroactive effect. The applicable regulation according to plaintiff is 19 C.F.R. § 353.46(a)(2) (1988). This regulation requires documents to "be submitted on letter-size paper, double-spaced, not permanently bound, but held securely together," but does not require parties to submit documents on computer tape. *Id.* The Court finds no merit in plaintiff's argument. Contrary to plaintiff's position, 19 C.F.R. § 353.31(e)(3) (1990), not the 1988 regulation upon which plaintiff relies, was in effect when Commerce issued its deficiency questionnaire to Yamaji.

On August 13, 1986, Commerce published its proposed rule and requested comments from the public. 51 Fed. Reg. 29,046. Commerce explained that 19 C.F.R. § 353.31 contained a new paragraph pertaining to the submission of computer tapes and printouts and that nonconforming submissions would be rejected. *Id.* at 29,052. On March 28, 1989, Commerce published the final rule which was to be effective as of April 27, 1989. 54 Fed. Reg. 12,742. The relevant part of the final rule reads as follows:

> *Computer tapes and printouts.* The Secretary may require submission of factual information on computer tape unless the Secretary decides that the submitter does not maintain records in computerized form and cannot supply the requested information on computer tape without unreasonable additional burden in time and expense. In an investigation or administrative review, the tape shall be accompanied by three copies of any computer printout and three copies of the public version of the printout.

19 C.F.R. § 353.31(e)(3) (1990).

Yamaji argues that Commerce's computer tape submissions requirement clearly violates Congress' intent as expressed in the legislative history of § 776(c) of the Trade Agreements Act of 1979. Plaintiff cites the following language:

> To further expedite assessment, the bill authorizes the Authority to require that information be submitted in a particular form and manner if reasonably available. For example, the Authority may require the exporter to furnish information on computer tape if the exporter maintains records in that form, but it may not require the exporter to purchase a computer or computerize information.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979). Plaintiff contends this legislative history precludes Commerce from demanding computer tapes from any respondent that does not maintain computerized records.

"It is an established principle of jurisprudence that where a statute's meaning is clear, that meaning will be controlling, even if relevant legislative history suggests another plausible interpretation." *Al Tech Specialty Steel Corp. v. United States,* 10 CIT 743, 746–47, 651 F. Supp. 1421, 1425 (1986) (citation omitted). A Court may, however, consult legislative history to ensure that application of a statute does not frustrate congressional policy.

Although Congress chose not to adopt the language plaintiff cites when it enacted § 776(c) of the Trade Agreements Act of 1979, the policy conveyed by Congress in its statement is important to the proper interpretation of the antidumping duty laws. The expressed concern of Congress in this piece of legislative history is twofold: (1) to expedite assessment of duties on entries subject to a dumping finding; and (2) to assure that requirements for a particular form for submissions are reasonable. Both of these concerns are addressed in 19 C.F.R. § 353.31 (e)(3). Through the use of computer tapes, Commerce is able to improve

the speed and efficiency of document handling. Moreover, Commerce provides a respondent that does not maintain its records in computerized form an opportunity to seek a waiver of the computer tapes requirement when the respondent would be unreasonably burdened in time and expense.

Because the legislative history is from 1979, it does not consider technological developments during the last fourteen years such as the widespread use of computers. Due to improved technology and the reduction in costs associated with computer use, a company may more easily own a computer or at least have access to a computer. In a past review of fishnetting from Japan, Commerce established the cost of having an outside computer company located in Tokyo input relevant data onto a computer diskette would range from $200.00 to $300.00. *Final Results of the 1988/1989 Antidumping Duty Administrative Review; Fishnetting of Man-Made Fibers From Japan,* 55 Fed. Reg. 30,948, 30,949 (1990). The data used to obtain the estimate consisted of a considerable number of transactions and accompanying data entries. *Id.* In fact, this regulation serves to aid congressional intent by satisfying two areas of concern: speed in investigations and fairness to the respondents. The Court holds that congressional policy has not been frustrated by Commerce's use of 19 C.F.R. § 353.31(e)(3).

Plaintiff nevertheless argues that it is per se unreasonable for Commerce to require the submission of computerized cost data when the exporter does not maintain computerized business records, citing *Timken Co. v. United States,* 11 CIT 267, 659 F. Supp. 239 (1987). The Court disagrees with plaintiff's interpretation of *Timken.* The *Timken* Court considered whether Commerce could be compelled to provide a petitioner computer tapes submitted by an exporter. *Id.* The Court merely quoted language from H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979). *Id.* at 269–70, 659 F. Supp. at 241. The Court did not discuss the legislative history, because it was not necessary for resolving the issue before it. Furthermore, because *Timken* was issued prior to the amendment of Commerce's regulations, the Court could not have discussed the legislative history as it applies to 19 C.F.R. § 353.31(e)(3).

Yamaji maintains *Rhone Poulenc* also supports its argument that the computer tapes requirement cannot apply to a respondent that does not keep computerized records. *See Rhone Poulenc, Inc. v. United States,* 13 CIT 218, 710 F. Supp. 341 (1989), *aff'd,* 8 Fed. Cir. (T) 61, 899 F.2d 1185 (1990). This Court does not agree with plaintiff's characterization of *Rhone Poulenc.* After determining that 19 C.F.R. § 353.46(a)(2) (1988) does not limit submissions to written documents, the *Rhone Poulenc* Court held Commerce may require those exporters who maintain their records in computerized form to supply information on computer tapes. *Id.* at 221, 710 F. Supp. at 344. The *Rhone Poulenc* opinion does not discuss respondents who do not keep computerized records. In addition, because the Court issued *Rhone Poulenc* prior to the effective date of 19 C.F.R. § 353.31(e)(3), the Court did not address this regula-

tion. The Court holds that plaintiff's reliance on both *Timken* and *Rhone Poulenc* is misplaced.

Plaintiff next argues that applying the new regulation to the instant case would have an improper retroactive effect. Yamaji points out that 19 C.F.R. § 353.31(e) (1990) does not include specific language indicating it is applicable to investigations and reviews already under way as of the regulation's effective date. Therefore, according to plaintiff, 19 C.F.R. § 353.51(b) (1988) applies. The Court does not find plaintiff's argument persuasive. Commerce did not apply the regulation retroactively; it applied the regulation prospectively to submissions requested from the date of the new regulation forward. The effective date of the regulation, April 27, 1989, was well before the date Commerce sent Yamaji its deficiency questionnaire, November 15, 1990. As a result, the Court holds that the application of 19 C.F.R. § 353.31(e) (1990) to Yamaji's deficiency questionnaire does not have a retroactive effect.

B. *Waiver of Computer Tape Requirement:*

Yamaji presents an alternative argument in the event the Court holds 19 C.F.R. § 353.31(e) (1990) is applicable to plaintiff's deficiency questionnaire. Plaintiff argues Commerce should have accepted its November 30, 1990 Letter as a request for a waiver and determined that a computer tape submission would be too great of a "burden in time and expense" for Yamaji. *See* 19 C.F.R. § 353.31(e) (1990). This letter states the following:

> We regret very much to inform you that it is an impracticable request for us to cope with owing to the following reasons:
>
> It costs us considerable expense to execute your request, as we have no computer here. Therefore, please see our data (Hand writing [sic]) already sent you at first and examine/understand the situation through [sic] the said data.

(R.Doc. 67). Yamaji maintains Commerce never responded to its request for a waiver, and therefore, Commerce should be required to accept Yamaji's handwritten submission. The Court holds Yamaji's letter did not constitute a request for a waiver of the computer tape submission requirement.

Based on the new regulation, Commerce will assess whether a respondent that does not maintain records in computerized form would incur an unreasonable, additional burden in time and expense by having to supply the requested information on computer tape. 19 C.F.R. § 353.31(e) (1990). Commerce directed Yamaji in the General Instructions to both Commerce's original questionnaire and its deficiency questionnaire that alternate forms of submission were available with Commerce's permission. R.Doc. 144 at 2 ("If you have very few sales, you may consult with the 'official in charge' about alternate forms of data submission."); R.Doc. 82 ("If you have very few sales, Lotus 1-2-3 is an option, but you must first receive permission from the Department.").

Despite Commerce's clear instructions, Yamaji never sought permission to use an alternative format for its submissions. Plaintiff never requested the opportunity to avail itself of the option presented by Commerce in the form of Lotus 1–2–3, a less expensive computer program. Instead, Yamaji merely stated in its letter to Commerce that it would be expensive to submit information on computer tape and it was therefore not complying. Because Commerce has no established waiver procedures for this situation, a degree of flexibility would appear appropriate for interpreting a respondent's request for waiver.[1] A generous reading of Yamaji's letter, however, does not indicate the letter rises to the level of a request for waiver. Therefore, the Court holds plaintiff's letter is not a request for waiver of the computer tape requirement.

C. *BIA:*

Yamaji contends Commerce should not have assigned it a 18.3% dumping margin as Commerce found plaintiff to be substantially cooperative. Plaintiff argues Commerce should have used information concerning current conditions rather than Yamaji's previous highest rate.

Commerce must use BIA "whenever a party or person refuses or is unable to produce information requested in a timely manner and *in the form required,* or otherwise significantly impedes an investigation." 19 U.S.C. § 1677e(c) (1988) (emphasis added). When a respondent has substantially cooperated, but has failed to provide the information in the form required, Commerce may consider a particular firm's own prior less than fair value rate. *Allied-Signal Aerospace Co. v. United States,* 11 Fed. Cir. (T) ____, Slip Op. 93–1049 at 12, 15 (June 22, 1993). The presumption that the highest prior margin is the best information available "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer knowing of the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc,* 8 Fed. Cir. (T) at 67, 899 F.2d at 1190–91 (emphasis in original).

In both the original questionnaire and the subsequent deficiency questionnaire, Commerce advised Yamaji that failure to comply would result in Commerce's use of BIA Despite Commerce's specific requests, Yamaji failed to submit the requested data on computer tapes.[2] Commerce therefore resorted to BIA and used as BIA the higher of (a) the highest calculated rate for a responding firm with shipments during the period or (b) the highest rate for that company from any previous review or from the original investigation. *Final Determination,* 56 Fed. Reg. at 49,457.

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[1] Plaintiff contends Commerce failed to notify it of the requirements for a formal waiver and thus violated the Administrative Procedures Act and the Due Process Clause. However, there were no formal waiver requirements in either the 1988 or the 1989 versions of the regulations. Accordingly, plaintiff's argument fails.

[2] In addition, the *Preliminary Determination* indicates Yamaji also failed to submit (1) information on the aggregate of sales of such or similar merchandise in the home market; and (2) information on the cost differences attributable to differences in physical characteristics between home market and U.S. merchandise. *Preliminary Determination,* 56 Fed. Reg. at 33,247. The parties, however, focused their briefs on Yamaji's failure to submit information on computer tape. Because the parties have not provided the Court with adequate information concerning this issue and because the Court is able to affirm the final determination on other grounds, the Court does not address the issue of Yamaji's failure to provide the above information.

In support of its argument that the most recent information must be used as BIA, plaintiff cites *Rhone Poulenc,* 13 CIT at 218, 710 F. Supp. at 341. This Court reads *Rhone Poulenc* as reaching the opposite conclusion. The *Rhone Poulenc* Court held that nothing in the statutes or regulations required Commerce to use the most recent information collected for BIA. *Id.* at 224–26, 710 F. Supp. at 346–47. The Court reasoned that if Commerce were forced to use the most recent information, respondents would be in a position to abuse the system by not cooperating whenever current information is not as advantageous as the most recent past information. *Id.* The Court holds Commerce lawfully assigned Yamaji a margin based on BIA of 18.3%.

Plaintiff objects to Commerce's assessing a lower margin based on BIA to two nonresponding parties, Toyama and Fakui. Although these two parties received lower margins, Commerce used the same method in establishing their margins as it did in determining Yamaji's margin: the highest margins for Toyama and Fakui from previous administrative reviews. 49 Fed. Reg. 18,339; 53 Fed. Reg. 10,264. The Court therefore holds that Commerce properly selected Yamaji's previous highest rate as BIA for this investigation.

D. *Due Process:*

Yamaji claims further that Commerce violated 19 C.F.R. § 353.51(b) (1988) and thereby deprived Yamaji of due process. Plaintiff maintains Commerce violated this regulation by (1) not providing plaintiff with an opportunity to correct the deficiencies in its submission; and (2) failing to notify plaintiff of its inadequate response. 19 C.F.R. § 353.51(b) states "[a]n opportunity to correct inadequate submissions will be provided if the corrected submission is received in time to permit proper analysis and verification of the information concerned."

Plaintiff's argument fails on both counts. Commerce provided plaintiff an opportunity to remedy the problems of its original submission when Commerce sent it a deficiency questionnaire. *See* R.Doc. 82. Although duly notified through the supplementary questionnaire, Yamaji chose neither to submit information on computer tape nor to obtain a waiver of the computer tape requirement. *See* R.Doc. 67. Upon receipt of Yamaji's letter indicating it would not submit a computer tape, Commerce was under no statutory requirement to inform Yamaji a second time that it must submit the requested information in the proper form.

Conclusion

After considering all of plaintiff's arguments, the Court holds that the Department of Commerce's final determination is supported by substantial evidence and is otherwise in accordance with law. Therefore, *Final Results of Antidumping Duty Administrative Reviews: Fishnetting of Man-made Fibers From Japan,* 56 Fed. Reg. 49,456 (1991) is sustained and this case is dismissed.

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